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Law

THE NEUTRAL REPORTAGE DOCTRINE 25 YEARS AFTER:

AN UPDATE ON THE STILL "FLEDGLING" LIBEL DEFENSE

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The debate about the viability of neutral reportage as a constitutional defense to libel continues. And given the "current limbo" that the neutral reportage doctrine is facing as it enters its 25-year evolution, the constitutional libel defense deserves another in-depth look. This article examines the theoretical underpinnings and judicial interpretations of the neutral reportage doctrine. Three questions provide the main focus: (1) What was the constitutional and common law framework on republication of defamatory statements?; (2) Why and how did the U.S. Court of Appeals for the Second Circuit formulate the neutral reportage doctrine to modify the republication rules?; and (3) How has the neutral reportage doctrine been applied by state and federal courts?

THE NEUTRAL REPORTAGE DONCTRINE 25 YEARS AFTER: AN UPDATE ON THE STILL "FLEDGLING" LIBEL DEFENSE

Republication of a libel is no less actionable than its original publication in American law: "One who republishes a defamatory statement [originally made by another] 'adopts' it as his own and is liable in equal measure to the original defamer."[1] American courts have traditionally refused to distinguish publishers from republishers of defamatory statements on the theory that "tale bearers are as bad as tale makers."[2] The common law republication rules have been deemed growingly inadequate by American courts especially "when they act to inhibit the flow of information about the very existence of the charges and accusations various persons and groups are hurling at each other in the midst of public controversies."[3]

The "neutral reportage" doctrine was established as a more accommodating substitute for the rather rigid republication rules. The doctrine posits that the press should not be liable for reporting, i.e., republishing, in a fair and neutral manner "newsworthy" allegations made by any "responsible" or "prominent" speaker about public figures.[4] The neutral reportage doctrine[5] is grounded in First Amendment principles because it revolves around "the subjective good faith of the journalist making the report and the public interest or newsworthiness of the story."[6]

The neutral reportage doctrine, which was first enunciated by the U.S. Court of Appeals for the Second Circuit in 1977, has been favorably received by lower state and federal courts as a whole but with "mixed" results, according to U.S. Circuit Judge Robert D. Sack.[7] U.S. District Judge Marilyn Patel stated in February 2002 that "there is a great deal of inconsistency among state court decisions" relating to the libel defense.[8] Likewise, media attorney Kelli L. Sager argued that "very few federal cases have addressed the neutral reportage privilege and, in those that have, the decisions appear to be 'all over the map.'"[9]

By contrast, Justice Andrew Douglas of the Ohio Supreme Court has noted the wide recognition of the neutral reportage doctrine in numerous jurisdictions, both state and federal.[10] Professor Rodney A. Smolla, author of a highly influential libel law treatise,[11] is not equally effusive in his assessment of the judicial status of neutral reportage. But he is warily sanguine: "[O]n the whole the doctrine appears to be gaining slow but steady acceptance."[12]

Given that the U.S. Supreme Court has yet to rule on the concept of neutral reportage,[13] it is hardly surprising that media defense lawyers have not widely resorted to the neutral reportage doctrine. One 2002 WESTLAW search of the doctrine concluded: "*Edwards* [*v. National Audubon Society*][[14]] has been cited both positively and negatively only 153 times, and just seventeen times in the past five years."[15] Furthermore, attorneys James E. Stewart and Laurie J. Michelson in the summer of 1999 detected an apparent "reversal" of the earlier judicial expansion of the parameters of neutral reportage.[16]

The debate about the viability of neutral reportage as a constitutional defense to libel continues. In 2000, a law review commentator proposed revision of the neutral reportage doctrine because its original framework "has become outdated in an age in which unsubstantiated and potentially false charges made by disreputable figures, publications, and Web sites play a significant role in the public forum."[17] More recently, another commentator predicted that Massachusetts courts will adopt the neutral reportage doctrine "if a more appropriate case arises" because "other jurisdictions have [now] developed the doctrine more fully."[18]

A good illustration of the still ongoing evolution of the neutral reportage doctrine is the impending ruling of the Pennsylvania Supreme Court in *Norton v. Glenn*[19] on the issue: Is the constitutional privilege of neutral reportage viable in Pennsylvania? The decision "may turn out to be the most important" on the neutral reportage doctrine since it was first recognized in 1977.[20]

Given the "current limbo" that the neutral reportage doctrine is facing as it enters its 25-year evolution, the constitutional libel defense deserves another in-depth look. This article examines the theoretical underpinnings and judicial interpretations of the neutral reportage doctrine.[21] Three questions provide the main focus: (1) What was the constitutional and common law framework on republication of defamatory statements?; (2) Why and how did the U.S. Court of Appeals for the Second Circuit formulate the neutral reportage doctrine to modify the republication rules?; and (3) How has the neutral reportage doctrine been applied by state and federal courts?

I. Republication Rules and Freedom of the Press

Let's assume the following scenario—hypothetically—that President George Bush claims at a White House news conference: "Vice President Dick Cheney was on the take from Enron." Bush adds: "I'm planting this to get rid of Cheney. The allegations aren't true. I'm just tired of having him around."[22]

Is there any way for American news media to publish President Bush's defamatory accusations without being exposed to libel actions by Vice President Cheney? As discussed earlier,[23] the common law of libel most likely will make the news media liable for defamatory republications unless they are protected by one or more of the libel defenses—truth, fair report privilege, and fair comment and criticism.

None of the well-settled libel defenses will apply to the news media's republication of Bush's accusations against Cheney. Truth, which is "an absolute defense" at common law,[24] is not usable as a defense because the accusations are concededly false. In connection with republication of defamation, truth should be distinguished from accuracy.[25] Truth is not equivalent to accuracy and thus it cannot be accepted as a defense even when the false accusations were republished accurately. This is because "the truth defense focuses on the substantial or underlying truth of the defamatory matter repeated, not the accuracy of its repetition."[26]

The republisher liability in libel law takes on heightened relevance to media professionals, for news media more often republish than originate statements. Publishers or broadcasters who merely report in a news story or advertisement a defamatory allegation by a third party may be liable for defamation.[27] Likewise, a newspaper or broadcasting station can be sued for letters to the editor, regardless of whether the media entity makes clear that the defamatory statements in the letters were those of the writer, not the republisher.

The relative strictness of the common law rule on truth has been ameliorated by the fair report privilege. The *Restatement (Second) of Torts* formulates the privilege thus: "[T]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported."[28]

The unique advantage of the fair report privilege as an exception to the republisher liability for defamation is considerable. The privilege is not concerned with the "substratal truth" of the truth defense. "Whether the official report or proceeding contains a 'nefarious lie' is irrelevant," libel law expert David A. Elder stated. "[T]he availability of fair report is 'not measured by the legal sufficiency or the truth' of the matter reported, but by the facial fairness and accuracy of the reportage thereof—i.e., by comparison with the information contained in the public record or proceeding or official action."[29]

The predominant rationale for the fair report privilege is "public supervision." The public has a "right to know" about what transpires in official proceedings and public meetings:

> [The privilege is justified] by the security which publicity gives for the proper administration of justice.... It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.[30]

The fair report privilege is qualified. As clearly evident from the *Restatement*'s formulation of the privilege, its invocation is occasioned by government proceedings and limited to accurate and fair reporting on the proceedings. In this light, the privilege is not likely to protect the media from actionable republication of President Bush's defamatory statements concerning Cheney because the statements are in no way related to any government proceedings.

Can the third common law defense of fair comment and criticism immunize the news media from liability for reports on Bush's defamatory attack on Cheney? The answer will likely be in the negative because the privilege of fair comment attaches to defamatory opinions insofar as they imply the allegation of *true* facts and are made honestly and without malice.[31] The policy justification for the fair comment privilege was articulated by the English court in 1808: "Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history, and the advancement of science."[32]

The well-established common law defenses of truth, fair report privilege, and fair comment have been modified by *New York Times Co. v. Sullivan*[33] in 1964, in which the U.S. Supreme Court "revolutionalized" American defamation law.[34] The Court, holding that the common law tort rules on libel were limited by the First Amendment on freedom of speech and the press, established the "actual malice" rule:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[35]

Noting the profound impact of the *Sullivan* case on American libel law, Professor Smolla has termed the decision "a case of enduring vitality, a case that continues to foster intense debate and continues to be drawn upon by courts charged with the task of reconciling the strong societal interest in protecting reputation with the 'central meaning' of the first amendment."[36]

The critical influence of the "actual malice" rule, as it has evolved from *Sullivan* and its progeny, over the common law of libel, is illustrated by the different status of truth as a defense. Judge Robert Sack of the Second Circuit observed: "Truth is usually now not a *defense*. Proof of falsity is instead part of the plaintiff's case, at least in defamation suits brought by public plaintiffs, or involving communications about public issues, or both."[37]

The requisite "fault" on the part of media libel defendants in publishing libel is derived from the fault resulting in falsity. There is no constitutional protection of false statements of fact per se because "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."[38] Nonetheless, false speech *is* protected by the First Amendment solely "in order to protect speech that matters"[39] and is supposed to be true.

By adopting the "actual malice" rule, the U.S. Supreme Court wanted to move the "marketplace of idea" theory a step closer to the balancing of freedom of expression with reputation. Quoting Judge Learned Hand, Justice William Brennan wrote in the *Sullivan* opinion for the Court:

> The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many, this is, and always will be, folly; but we have staked upon it our all."... Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.[40]

However, the marketplace of ideas theory of the "actual malice" rule did not go far enough to displace the common law republication rule altogether, although it attenuated the restrictive impact of the common law rule considerably. The "actual malice" requirement still holds media defendants liable for defamatory republications if they know the falsity of the original statements or disregard the falsity recklessly. Thus, the "actual malice" protection will be of little value to a news professional who republishes a defamatory statement because "its content is newsworthy or because the act of making the statement is itself newsworthy or both," not necessarily because his or her decision to republish the statement is based on its "perceived" truth.[41]

The disparity between the "actual malice" rule and the reality of news reporting was noted by the U.S. Supreme Court in *Time, Inc. v. Pape*[42] in 1971:

> [A] vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like.[43]

Indeed, American news media are in varying degrees "in the business of *reporting* newsworthy accusations," not evaluating their merit.[44] The neutral reportage doctrine was offered as a novel device to soften the journalistically constrictive element of the "actual malice" rule.

II. Neutral Reportage as a Constitutional Privilege for the News Media

The neutral reportage doctrine is considered an attractive improvement in the "often anomalous" law of libel[45] since the U.S. Supreme Court constitutionalized the law in 1964. This is especially the case when the doctrine is a judicial recognition of "the practical necessities inherent in reporting the news without infringing on the state's legitimate interest in providing compensation for injury to reputation."[46] The facts of *Edwards v. National Audubon Society*,[47] the 1977 libel case of the 2nd U.S. Circuit, are revealing in that the "actual malice" rule was inadequate in protecting the news media from liability for republicational liability.

Edwards originated from the National Audubon Society's accusations against a group of scientists, who disagreed with environmentalists over the impact of the pesticide DDT on wildlife. An editorial preface published in *American Birds*, an Audubon Society's publication, had charged that "anytime you hear a 'scientist' say [that large numbers of birds are not dying as a result of DDT], you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."[48]

New York Times nature reporter John Devlin, who learned about the Audubon Society's accusations, thought that the charges were a "newsworthy" development in the DDT debate. He obtained the names of the scientists, including a Nobel laureate, whom the Society called "paid liars."[49] In his *New York Times* news story, headlined "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count," Devlin republished the accusations and named the accused scientists. He included denials from three of the five scientists whom he could reach for comment.[50]

The scientists who were quoted in the *Times* story sued the Audubon Society and the New York Times Co. for defamation.[51] The trial court found the plaintiffs to be public figures and thus subject to the "actual malice" rule.[52] The jury awarded $61,000 damages to the plaintiffs.[53] The court denied the New York Times's motion for judgment notwithstanding the verdict. The court reasoned that the *Times* reporter had been "reckless" in failing to verify the accusations even after he was alerted to the libelous potential of the accusations and he was provided with information rebutting the charges.

On appeal, the Second Circuit reversed the lower court's ruling. Chief Judge Irving Kaufman, writing for a unanimous court, noted the balancing of reputational interests and freedom of expression in a democracy.

> [T]he interest of a public figure in the purity of his reputation cannot be allowed to obstruct that vital pulse of ideas and intelligence on which an informed and self-governing people depend. It is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompense: but this is the price that must be paid for the blessings of a democratic way of life.[54]

Proceeding from the First Amendment premise that citizens in a self-governing democracy require information on which to base their decision-making,[55] Judge Kaufman stated that a reporter is constitutionally protected by a right of "neutral reportage":

> Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's views regarding their validity. *What is news about such statements is that they were made.* We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. The public interest in being fully informed about controversies that often rage around sensitive issues *demands that the press be afforded the freedom to report such charges without assuming responsibility for them.*[56]

The Second Circuit, however, drew the boundaries of the neutral reportage doctrine by requiring the reporter's "reasonabl[e] and in good faith" belief in the accuracy of the report on defamatory charges. Further, the libel defense cannot be used when "a publisher … in fact espouses or concurs in the charges made by others, or … deliberately distorts these statements to launch a personal attack of his own on a public figure."[57]

Under this newly recognized privilege of neutral reportage, the Second Circuit ruled that the *New York Times* story was protected under the First Amendment because it was fair and accurate in reporting the Audubon Society's charges against the scientists. The Second Circuit also stated that the reporter did not support or refute the charges and that the article contained the

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scientists' "outraged" responses to the Society's attack. The federal appeals court termed the *Times* story "the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps."[58]

In creating a new libel defense, Judge Kaufman provided a rationale for the constitutional protection of dispassionate reporting of newsworthy accusations by one public figure about another. At the heart of this justification was a marketplace perspective:

> In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet. It is elementary that a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently govern themselves.... To preserve the marketplace of ideas so essential to our system of democracy, we must be willing to assume the risk of argument and lawful disagreement.[59]

On the other hand, the federal appeals court went on to hold that "absent the special protection afforded to neutral reportage … the evidence adduced at trial was [nonetheless] manifestly insufficient to demonstrate 'actual malice' on the part of the Times."[60] Thus, the court concluded: "[E]ven if the Times were required to assume direct responsibility for the accusations, it could not, consistent with *New York Times Co. v. Sullivan* … be found liable for defamation."[61] The "actual malice" holding of the Second Circuit as an alternative ground to absence of the neutral reportage privilege in *Edwards* is deemed to have relegated neutral reportage to dictum and thus undercut its importance.[62]

III. Judicial Interpretations of Neutral Reportage: Searching for a Roadmap

A 1999 study of "a relatively small number" of neutral reportage cases in 1993-98 noted that "courts are strictly adhering to the *Edwards* factors in determining whether to apply the privilege or, when possible, avoiding the matter altogether by relying upon other, more widely accepted privileges."[63] The restrained interpretation of the neutral reportage doctrine in recent years stands in sharp contrast with the "limited judicial willingness to apply neutral reportage in an *expanded* version" in 1987-1997.[64]

The following case analysis of neutral reportage in the last five years proceeds by examining all the cases, published and unpublished, since May 26, 1997, that have applied or rejected *Edwards* for a variety of reasons.[65] Also included in the discussion of the neutral reportage cases is *Norton v. Glenn,*[66] the 2002 ruling of the Pennsylvania Superior Court, in which neutral reportage was rejected dismissively. More importantly, however, the Pennsylvania Supreme Court will decide definitively on the constitutional libel defense in Pennsylvania law in the near future.[67]

To those proponents of the neutral reportage doctrine, the California Supreme Court's refusal in *Khawar v. Globe International, Inc.*[68] to apply the constitutional privilege came as "a significant blow."[69] Nonetheless, the blow was not fatal to the overall future of neutral reportage in California law—at least for now.

The California Supreme Court held in November 1998 that the news media are not immune to liability under the neutral reportage privilege when they republish defamatory statements concerning a *private* figure.[70] The court specifically stated: "We do not decide or imply … that the neutral reportage privilege exists as to republished defamations about public figures."[71] Noting that "the very existence of the privilege as a matter of constitutional law is uncertain," the court left for another day the broader question of whether state or federal constitutional principles mandate the recognition of the privilege for republished statements about public figures or public officials.[72]

The 1998 libel case started when a weekly tabloid, *Globe*, published an article in April 1989 based on a previously book about the assassination of Sen. Robert Kennedy. The *Globe* reporter allegedly read the entire book and then conducted an in-depth interview of its author. The book claimed that Kennedy was murdered by the Iranian Secret Police in conjunction with the Mafia and said the true assassin was Ali Ahmand. The book contained four photos captioned "Photographs of Ali Ahmand." These photos depicted the plaintiff, Khalid Khawar, standing on the podium near Kennedy on the night of the assassination. Ahmand is the father of Khawar.

The *Globe* article was accompanied by a photo of Khawar which had been published in the book but now with an arrow pointing to him.[73]

Khawar sued for libel and at trial a jury found that the *Globe* article was a neutral report but that the newspaper published its article negligently and with "actual malice." The judge disagreed with the jury that the article was a neutral and accurate report. On appeal, the *Globe* maintained its defense of neutral reportage on a two-fold foundation: (1) The information it published was a republication, and (2) Even if Khawar was a private figure, many courts had held that the neutral reportage privilege encompasses the right to report an allegation concerning a private figure.[74]

The California Court of Appeals in *Khwar* ruled that the neutral reportage privilege does not extend to reports on private figures, which it determined Khawar was.[75] The court noted that "the neutral reportage privilege … is not without limitations. It cannot be used as an absolute privilege to republish defamatory statements about purely private persons not already caught up in a public controversy."[76] Thus, while acknowledging the neutral reportage privilege as a necessary protection for news reporting, the California appellate court stated that the privilege must be balanced against protecting individual reputations, particularly when private figures are involved. In addition, the court chose not to determine whether the privilege exists at all in California because, even if it did, it said it would not apply to Khawar—a private figure.[77]

The California Supreme Court first rejected the *Globe*'s argument that Khawar was an involuntary public figure in connection with the public controversies surrounding the assassination of Sen. Kennedy or Morrow's book about that assassination.[78] The court explained:

> Assuming a person may ever be accurately characterized as an *involuntary* public figure, this characterization is proper only when that person, although not having voluntarily engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient in effectively countering media-published defamatory statements.[79]

The court held that Khawar acquired no such access to the media in relation to the controversy as to permit him to effectively counter the defamatory falsehoods in the *Globe* article.[80]

After determining that Khawar was a private figure, the California Supreme Court addressed the application of the neutral reportage privilege to republications of statements about private figures. The court paid close attention to the *Edwards* definition of neutral reportage. The court emphasized the responsibility of the original defamer ("responsible, prominent organization"), the status of the target of defamation ("public figure"), and the accuracy and neutrality of the report ("accurate and disinterested reporting").[81]

In theorizing about the value of neutral reportage from a marketplace of ideas perspective, the California Supreme Court held:

> [T]he reporting of defamatory allegations relating to an existing public controversy has significant informational value for the public regardless of the truth of the allegations: If the allegations are true, their reporting provides valuable information about the target of the accusation; if the allegations are false, their reporting reflects in a significant way on the character of the accuser. In either event … the very making of the defamatory allegations sheds valuable light on the character of the controversy (its intensity and perhaps viciousness).[82]

The court pointed out, however, that the U.S. Supreme Court has not said that the First Amendment requires recognition of the neutral reportage privilege. The court further noted that it had not addressed "the question whether the neutral reportage privilege will be recognized" in California.[83] While noting the variance among courts and scholars on neutral reportage, the court stated that the neutral reportage privilege, as originally articulated in *Edwards*, "applied only to publications of defamatory statements concerning public officials or public figures." Among the courts that recognize the privilege in one way or another, the court observed that "almost all acknowledge this limitation."[84]

The California Supreme Court declined to accept various propositions that neutral reportage should expand to a republication of an accusation made by a public figure against a private figure. Rather, the court found "more persuasive" the counter-propositions that the neutral reportage privilege should not protect republications of defamatory allegations that public figures have made against private figures.[85] The court argued that "only rarely" will a report of defamatory accusations against a private person provide valuable information about a matter of public interest. The court, keenly aware of the balancing of competing interests in libel said that such a report could have "a devastating effect on the reputation of the private person, "who has not voluntarily elected to encounter an increased risk of defamation and who may lack sufficient media access to counter the accusations." The court added: "The availability of a defamation action against the source of the falsehood may be an inadequate remedy if the source is insolvent or otherwise unable to respond in damages. Moreover, it is questionable whether money damages are ever a completely adequate compensation for injury to reputation."[86]

In the 2000 *non-media* libel case of the Second Circuit, *Konikoff v. Prudential Insurance Co. of America,*[87] Paula Konikoff, a real estate appraiser, sued Prudential for defamation, claiming that the insurance company's investigative report on its real-estate funds damaged her professional reputation. She stated that the report implied that "she may in fact have been compromised or coerced by Prudential into reporting a biased or false property value."[88] She also asserted that a statement in a Prudential meeting falsely suggested that her appraisal was not independent and that she was fired because of the allegations of property overvaluing.[89]

The U.S. district court held in its dismissal of the lawsuit that Prudential's statements at issue were protected by New York's qualified common law privileges of "common-interest" and "self –interest."[90] Nonetheless, the U.S. appeals court refused to apply the privileges to the company's statements, reasoning that application of the privileges in the case "could have significant ramifications."[91] The court was concerned that the privilege might be extended to "*all* defensive statements to and through the media made by people and entities that deal with the general public, on the theory that all such communications are either in the legitimate self-interest of the speaker or in the common interest of the speaker and the general investing or consuming public."[92]

The federal appeals court affirmed the judgment of the district court under a better established New York libel standard—"gross irresponsibility." As the New York Court of Appeals in *Chapadeau v. Utica Observer-Dispatch, Inc.*[93] defined the standard: "Where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover" if he or she can establish "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[94] In applying the New York libel law, the U.S. appeals court in *Konikoff* ruled that Prudential was not "grossly irresponsible" in disseminating the challenged statements because it aimed to inform the public about the assessment by independent investigators of the allegations against the company's valuation practices.[95]

The *Konikoff* court distinguished the *Chapadeau* test from the "actual malice" rule of *Sullivan*. Rejecting the notion that "actual malice" is simply "a more onerous version of "gross irresponsibility," from a libel plaintiff's perspective, the court stated:

> Ordinarily a communication made with "actual malice" is also made in violation of the *Chapadeau* standard because ordinarily it is grossly irresponsible to make a defamatory statement knowing that it is false or while highly aware that it is probably false. But this is not necessarily the case. There are situations in which *a statement may be published with awareness of its probable falsity under the Sullivan line of cases and yet neither in a grossly irresponsible manner nor without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties under Chapadeau.*[96]

In this connection, the federal appeals court paralleled the *Chapadeau* standard with the neutral reportage doctrine.[97] As Judge Sack, who wrote the opinion of the Second Circuit in *Konikoff*, aptly put it recently, neutral reportage "has arguably stolen in through the back door."[98] The Second Circuit's sophisticated discussion of the neutral reportage doctrine in the course of differentiating between the "actual malice" and the *Chapadeau* tests is a significant development in the history of neutral reportage as a libel defense. This is all the more telling when it is read against the New York Court of Appeals' explicit rejection of neutral reportage in 1982.[99]

Norton v. Glenn,[100] which will likely define the road map on the neutral reportage doctrine, stemmed from an article published in the *Chester County Daily Local* in April 1995. The newspaper article, headlined "Slurs, Insults Drag Town into Controversy," reported defamatory remarks that William T. Glenn., then a member of the Parkesburg Borough Council, made about James B. Norton III, the Parkesburg Borough Council president. In the article, Glenn characterized Norton and Parkesburg Mayor Alan M. Wolf as "queers" and "child molesters. He was also quoted in the article as calling Borough Solicitor James J. Marlowe a "shyster Jew."[101]

Norton, along with Wolfe and Marlowe, filed a defamation lawsuit against Glenn as well as Troy Publishing Co., publisher of the *Local Daily* and reporter Tom Kennedy, who wrote the news story. A jury returned verdicts against Glenn. But the media defendants were held not to be liable. The trial judge excluded evidence on the neutral reportage privilege and instructed the jury that the privilege applied.[102]

Norton and other plaintiffs appealed. They argued that the trial judge erred in applying neutral reportage to the facts. The Pennsylvania Superior Court vacated the trial court's judgment and remanded the case for a new trial in March 2002. The superior court concluded: "Since the trial court found [that the neutral reportage] privilege applied, based evidentiary rulings on this premise and instructed the jury as such, it committed an error of law that controlled the outcome of the case."[103]

Superior Court Judge Michael T. Joyce, writing for the court, said that the privilege is not found anywhere in the U.S. or Pennsylvania Constitutions.[104] Further, he stated the neutral reportage privilege "was borne out of a misconstruction of *Time, Inc. v. Pape*."[105] After a detailed discussion of *Pape*,[106] Judge Joyes said the 1972 U.S. Supreme Court case "did not carve out a privilege allowing 'prominent' organizations expanded rights, it did not alter the law of defamation depending on who is speaking, and it did not espouse a rule that disregarded the private views of the reporter regarding the validity of what is reported."[107] Relying on a 1979 case of the Third Circuit, *Dickey v. CBS, Inc.*,[108] he characterized *Edwards* as "an overly expansive interpretation" of *Pape*, which he claimed did not alter the "actual malice" rule of *Sullivan*.[109]

Despite the unconvincing genesis of the neutral reportage doctrine, however, Judge Joyce acknowledged, with little elaboration, that it has been applied in some form by the 8th U.S. Circuit Court of Appeals, the U.S. District Court for the Southern District of New York and the U.S. District Court for the Northern District of California.[110] He noted the Pennsylvania Superior Court's discussion of the doctrine in a 1988 case, but dismissed it as obiter dictum and thus of no precedential authority.[111] He further said: "It should be pointed out that no court is bound by the neutral reportage privilege enunciated in *Edwards*, because the privilege itself was obiter dictum."[112]

In his concurrence, Judge Frank J. Montemuro agreed with the majority of the Pennsylvania appellate court that "no neutral report privilege exists as such in Pennsylvania" and that the case should be returned for retrial.[113] He also cautioned against confusing the fair report privilege, which he said "is and has remained unarguably alive for some time" in Pennsylvania, with the neutral reportage privilege.[114]

The fair report privilege, Judge Montemuro said, "protects the press from liability for the publication of defamatory material if the published material reports on an official action or proceeding," but "the privilege may be forfeited by a publisher who "exaggerates or embellishes its account of the occasion."[115]

The Pennsylvania Superior Court's rejection in *Norton* of the neutral reportage doctrine is more direct and explicit than any other previous judicial refusal to adopt the libel defense in the past 25 years. No doubt the court's efforts to rectify the trial judge's clear error of regarding the fair report privilege and the neutral reportage doctrine as synonymous were warranted. The court's dismissive criticism of neutral reportage, however, sounds like an overkill especially when it contends, citing its only previous opinion for support, that the neutral reportage holding in *Edwards* was dictum and thus it's not binding upon any other courts. In this light, it is singularly noteworthy that the Pennsylvania Supreme Court is currently considering Pennsylvania law on neutral reportage.[116]

Coliniatis v. Dimas,[117] a 1997 libel case of a federal district court in New York, illustrates how courts try to stick to the *Edwards* boundaries of neutral reportage but with little clear-cut understanding of the relevant decisional law. Nicholas Coliniatis sued the *National Herald*, a Greek-language newspaper in New York City for defamation. The newspaper published an article charging him with taking "kickbacks" as an employee of the Olympic Airways, the national airline of Greece. The *National Herald* article was based on the letter prepared by Simos C. Dimas, a partner at a law firm hired by the Olympic,[118]

The *National Herald* sought dismissal on the ground that Cliniatis, a public figure, could not prove "actual malice" on the part of the newspaper in publishing the defamatory allegations against him. As an alternative, the newspaper argued that the article was protected by the neutral reportage doctrine.[119]

The U.S. district court agreed with the *National Herald*. First, the court found the article in question to be "accurate and disinterested" in that it quoted Dimas' letter fully and accurately and did not subscribe to nor distorted any of the charges in the letter.[120] Further, the article was "well-balanced and neutral," according to the court, because it described what information was lacking or disputed. Secondly, the law firm, retained by the Olympic, was a "responsible, prominent organization" within the meaning of *Edwards*. The court characterized the "responsible, prominent organization" requirement of the neutral reportage doctrine as "a proxy for determining when the very fact that allegations are made is itself newsworthy… as well as an indication that a report is likely to be reliable to insure that an irresponsible republisher of unsupported allegations cannot hide behind the aegis of the privilege."[121] In this light, the court said that the Greek-American community's interest in Olympic made "newsworthy" the fact that Dimas, the company's own counsel, did make such defamatory allegations against the plaintiff.

The federal district court in *Coliniatis* further held Dimas' law firm trustworthy in respect to Olympic. Inexplicably, however, the court cited the seemingly contradictory neutral reportage decisions from U.S. district courts in the District of Columbia and California. That is, while the *Coliniatis* court limited its application of neutral reportage to the facts within the *Edwards* boundaries, the court's reliance on *In re United Press International*[122] and *Barry v. Time*[123] for precedential authority shows that the court's application of the libel defense can be more expansive than the Second Circuit in *Edwards* envisioned. The federal district courts in *In re United Press International* and in *Barry* extended neutral reportage protection beyond the *Edwards* facts. The courts held that the repetition of only the statements of "responsible" or "prominent" defamers is "inconsistent" with the raison d'etre of the doctrine (*In re United Press International)* and the trustworthiness of the original speaker is not as important as neutrality of reporting (*Barry)*.

The Arkansas Supreme Court's 2001 implicit discussion of neutral reportage indicates that courts still tend to equate neutral reportage with the fair report privilege. In the often ill-informed equation of the two libel defenses, the fair report privilege is almost invariably opted over the neutral reportage doctrine.[124] In *Butler v. Hearst-Argyle Television, Inc.*,[125] the Arkansas Supreme Court upheld a judge's dismissal of a libel lawsuit filed by Brad Butler against Hearst-Argyle Television, Inc. Benton County Circuit Judge Ted Capeheart dismissed the suit on the ground that the television station's reporting on an affidavit of Benton County jail inmate Stephanie Roberts was a fair report based on the official court proceedings. In appealing from Judge Capeheart's decision, Butler argued that the fair report privilege does not apply "when the defamatory statement results from elicitation and coercion" and when the report was not fair, truthful or accurate."[126]

The Arkansas Supreme Court affirmed the trial court's granting of summary judgment to the media defendant. The court concluded that "no genuine issue of material fact has been presented on the question about whether the fair-report privilege applies."[127] In the meantime, the court's overview of the "modern" common law libel defense took note of *Lawton v. Georgia Television Co.*[128] and *Barry v. Time, Inc.*[129] The Arkansas Supreme Court's citations to the two libel cases are clearly inapposite because the court seemed to treat the fair report privilege and neutral reportage privilege to be the same, assuming wrongly that malice is a non-issue in application of either privilege.

It is always correct that the neutral reportage privilege does not hinge on malice, whether common law or constitutional. But the fair report privilege is not equally "door-closing" on the question whether malice defeats the privilege.[130] Indeed, the Georgia Superior Court in *Lawton* was egregiously confused between the fair report and the neutral reportage privileges, when it argued:

> Underscoring the protection accorded the media in reporting serous accusations made about a public official in a *government record*, the court [2nd U.S. Circuit] in *Edwards v. National Audubon Society, Inc.*, … alluding to the special protection afforded the media in neutral reportage of *official proceedings* stated: "The First Amendment protects the disinterested reporting of charges … [of an *official proceeding*] regardless of the reporter's private views regarding their validity."[131]

IV. Discussion and Analysis

More than 25 years have passed since "neutral reportage " was introduced to the lexicon of American libel law. The neutral reportage doctrine, as formulated by the U.S. Court of Appeals for the Second Circuit in *Edwards v. National Audubon Society*, was posited as a more sensible and sensitive alternative to the common law republication rule from a news reporting perspective.

Nonetheless, neutral reportage is still a "fledgling" constitutional privilege. Its growing but still scanty decisional law often leads news professionals and media law practitioners to wonder whether they can rely safely on the neutral reportage privilege in republishing defamatory accusations.[132] Why is this lack of predictability and consistency in application of the neutral reportage doctrine?

The theoretical underpinning of the Second Circuit's adoption of neutral reportage as a privilege relates to how to protect news journalism from the "chilling effect" of the constitutional "actual malice" rule and the common law republication rule. The news media need to be encouraged rather than discouraged in disseminating newsworthy charges made by public figures against others. In a carefully defined set of *Edwards*-like circumstances, the open marketplace of ideas principle should leave open the possibility that the fact that accusations have been made is or can be as significant as whether the defamatory accusations were true or not. On the other hand, equally convincing are the arguments that, as a matter of constitutional law under the *Sullivan* doctrine, republication of knowing falsehoods is of little or no value to the marketplace of ideas envisioned by American democracy.

The inevitable confluence between journalistic reality and the constitutional/common law on reputation vs. press freedom has been an unending dilemma facing various courts in applying neutral reportage since 1977. Courts have been evenly split on acceptance and rejection of the neutral reportage privilege. Thus far, many courts have been reluctant to adopt the privilege for a number reasons. To begin with, they are still unfamiliar with the rationale, scope, and application of the libel defense partly because there's been conflicting caselaw on the privilege. Secondly, professionally and institutionally, judges "play safe" by avoiding possible experimentation with the still novel doctrine when they are unsure about where to draw the line on its potentially expansive application. As a consequence, media lawyers are diffident about pushing the libel defense as far as they wish.

The score card on the neutral reportage privilege in the last five years is illuminating. The California Supreme Court in 1998 said "No" resoundingly to application of neutral reportage to *private* persons, while refusing to take a definitive stand on the constitutional libel defense in general. By contrast, the Second Circuit reaffirmed neutral reportage and applied it to a *private* individual in a *non-media* libel case. The Second Circuit's 2000 application of the neutral reportage doctrine was "extraordinary and stunning" because it was under New York's "gross irresponsibility" standard despite the New York courts' refusal to adopt the doctrine in private-person cases.[133]

The Pennsylvania Superior Court's rejection in *Norton v. Glenn* of neutral reportage reveals judicial hostility toward the doctrine. And it exemplifies how courts refuse to recognize neutral reportage by questioning its conceptual precedents and by suggesting that neutral reportage was not part of the holding in *Edwards*. *Norton* is not the last word on the privilege in Pennsylvania law. The Pennsylvania Supreme Court is currently reviewing the lower court's decision specifically in connection with its holding on the neutral reportage doctrine.

The Pennsylvania Superior Court's dissection of *Time, Inc. v. Pape* as *Edwards'* precedent for neutral reportage is informative. But the court seemed to be oblivious to the informational interest justifications that *Pape* shares with *Edwards*. Further, its conceptual analysis of neutral reportage is surprisingly devoid of any substantive and nuanced discussion of the theoretical framework of the privilege. It concentrates on any possible disparity between *Edwards* and its cited cases in support of neutral reportage.

More problematic about the Pennsylvania appellate court's ruling on neutral reportage is the court's dubious characterization of the doctrine as dictum. As the Second Circuit in *Cianci v. Times Publishing Co.*[134] made it clear, the neutral reportage privilege in *Edwards* was the law, not dictum, while "actual malice" was noted as an alternative holding. Indeed, if the Pennsylvania Superior Court's reading of neutral reportage in *Edwards* is stretched further, we might wonder whether the "actual malice" rule might have been dictum from *Sullivan*. The U.S. Supreme Court in *Sullivan* held that, in addition to absence of "actual malice" in the defamatory publication, "the allegedly statements were [not] made 'of and concerning' respondent [Sullivan]"[135] and thus the New York Times was not liable.

The unfamiliarity of judges with neutral reportage is remarkable when some of the recent cases are an indication. Judges continue to have difficulty distinguishing between the neutral reportage doctrine and the fair report privilege. As a result, neutral reportage is misapplied, which generates conflicting interpretations of the constitutional libel defense. The Arkansas Supreme Court's approving citation in *Butler v. Hearst-Argyle Television, Inc.* to the Georgia Superior Court's 1994 case, in which neutral reportage and fair report were egregiously confused, is a case in point.

Overall, neutral reportage is still an emerging libel defense as it was 10 or 20 years ago. Its applicational boundaries continue to be drawn, and its conceptual similarities and differences with other better established libel defenses are duly noted or, in some cases, inexplicably ignored. To a certain extent, the California Supreme Court's interpretation of the neutral reportage privilege in *Khawar* and the Pennsylvania Supreme Court's ongoing review of the privilege in *Norton* reflect the uncertain future of the constitutional libel defense. When the Pennsylvania Supreme Court rules on the privilege in the near future, however, the court will take a comprehensive look at the history, rationale, and judicial interpretations of neutral reportage. And neutral reportage will likely be less confusing and more clear.

The influential Second Circuit's reaffirmation in *Konikoff* of neutral reportage is encouraging. But it should be emphasized that the "gross irresponsibility" test of New York libel law ensures the continued vitality of neutral reportage in New York. In no small measure was neutral reportage applied primarily in order to clarify the scope of "gross irresponsibility" vis-à-vis the "actual malice" rule of *Sullivan*. Thus, the Second Circuit's latest discussion of neutral reportage should be read discerningly in the context of the unique libel standard in New York.

Reference Notes

[1] Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1298 (D.C. Cir.), *cert. denied*, 438 U.S. 825 (1988).

[2] Barry v. Time, Inc., 584 F. Supp. 1110, 1112 (N.D. Cal. 1984) (citations omitted).

[3] Rodney A. Smolla, *Law of Defamation* § 4:97, at 4:145 (2d ed. 2002).

[4] Edwards v. Nat'l Audubon Soc'y, 5566 F.2d 113 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977).

[5] It is also referred to as the "neutral reportage privilege, " the "privilege of accurate republication," or the "privilege of fair report." *See* DiSalle v. P.G. Publ'g Co., 15 Media L. Rep. (BNA) 1873, 1880-88 and 1880 n.6 (Penn. Super. Ct. 1988).

[6] Young v. Morning Journal, 25 Media L. Rep. (BNA) 1024, 1027 (Ohio 1996) (Douglas, J., dissenting).

[7] Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 7.3.2.4.3, at 7-40 (3d ed. 2002).

[8] "Panelists Debate Scope of Neutral Reportage Privilege," *Media L. Rep.*, April 9, 2002 (quoting Judge Marilyn Patel of the U.S. District Court in California).

[9] *Id.* (quoting attorney Kelli L. Sager of DAVID WRIGHT TREMAINE in Los Angeles, Calif.).

[10] *Young*, 25 Media L. Rep. (BNA) at 1027 (Douglas, J., dissenting).

[11] *See* Rodney A. Smolla, *Law of Defamation* (2d ed. 2002).

[12] *Id.* § 4:100, at 4-148 (citation omitted).

[13] Only one justice of the U.S. Supreme Court expressed interest in the doctrine. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 694-95 (1989) (Blackmun, J., concurring). Justice Blackmun said:

> [P]etitioner has eschewed any reliance on the 'neutral reportage' defense.... This strategic decision appears to have been unwise in light of the facts of this case.... Were this Court to adopt the neutral reportage theory, the facts of this arguably might fit within it. That question, however, has also not been squarely presented."

Id. at 694-95.

[14] *Edwards v. National Audubon Society* of the U.S. Court of Appeals for the Second Circuit (1977) was the seminal case for the neutral reportage doctrine. For a discussion of *Edwards*, see *infra* notes 45-62 and accompanying text.

[15] Michael Huber, "*Edwards v. National Audubon Society* Twenty-Five Years Later: Whatever Happened to Neutral Reportage?," *Comm. Law.*, Spring 2002, at 15.

[16] James E. Stewart & Laurie J. Michelson, "Reining in the Neutral Reportage Privilege," *Comm. Law.*, Summer 1999, at 14. *See also* Joseph A. Russomanno & Kyu Ho Youm, "Neutral Reportage' and Its Second Decade: A Marketplace Perspective," 3 *Comm. L. & Pol'y* 439, 475-76 (1998) (noting that "[o]verall, the judicial enthusiasm for neutral reportage in its second decade has been less evident than it was in its first decade" and that "[t]he doctrine has not been invoked as frequently as was expected in the pre-1987 era") (citation omitted).

[17] Keith C. Buell, Note, "'Start Spreading the News': Why Republishing Material from 'Disreputable' News Reports Must Be Constitutionally Protected," 75 *N.Y.U. L. Rev.* 966, 966 (2000).

[18] Kimberley Keyes, Note, "Freedom Without Responsibility: Do Massachusetts Media Defendants Need the Neutral Reportage Privilege?," 34 *Suffolk U. L. Rev.* 373, 393 (2001).

[19] 815 A.2d 1040, 1040 (Penn. 2003) (per curiam). For a discussion of *Norton v. Glenn*, see *infra* notes 100-116 and accompanying text.

[20] Adam Liptak, "Libel Suit Challenges the Right to Report a Politician's Slurs," *N.Y. Times*, March 31, 2003, at A8.

[21] This study is a follow-up on the 1998 analysis of the neutral reportage doctrine. *See* Russomanno & Youm, *supra* note 16.

[22] This hypothetical is based on what attorney Alan H. Fein presented during the 2002 annual conference of the American Bar Association's Forum on Communications Law in Boca Raton, Fla. *See* Huber, *supra* note15, at 15.

[23] *See supra* notes 1-2 and accompanying text.

[24] Gantry Constr. Co. v. Am. Pipe & Constr. Co., 122 Cal. Rptr. 834 (1975).

[25] Sack, *supra* note 7, § 7.3.2, at 7-11 n.37.

[26] David A. Elder, *Defamation: A Lawyer's Guide* § 2:2[s], at 14 (2002) (citation omitted).

[27] *See,e.g.*, Cepeda v. Cowles Magazines & Broad., Inc., 38 F.2d 869 (9th Cir.), *cert. denied*, 379 U.S. 844 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[28] *Restatement (Second) of Torts* § 611 (1977).

[29] Elder, *supra* note 26, § 3:1, at 4 (citations omitted).

[30] Cowley v. Pulsifer, 137 Mass. 392, 394 (1884), *quoted in* Medico v. Time, Inc., 643 F.2d 134, 141 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981).

[31] W. Page Keeton et al., *Prosser and Keeton on Torts*, § 115, at 831-32 (5th ed. 1984)

[32] Tabart v. Tipper, 170 Eng. Rep. 981, 982 (1808). For incisive commentary on fair comment and criticism as a libel defense in English law, see Geoffrey Robertson & Andrew Nicol, *Media Law* 119-25 (4th ed. 2002).

[33] 376 U.S. 254 (1964)

[34] Smolla, *supra* note 11, § 2:1, at 2-4.

[35] *Sullivan*, 376 U.S. at 279-80.

[36] Smolla, *supra* note 11, § 2:3, at 2-14.

[37] Sack, *supra* note 7, § 3.11, at 3-2.

[38] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[39] *Id.*

[40] *Sullivan*, 376 U.S. at 270 (citing United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

[41] Sack, *supra* note 7, §7.3.2, at 7-11 (citation omitted).

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[42] 401 U.S. 279 (1971).
[43] *Id.* at 285-86.
[44] Marc A. Franklin et al., *Mass Media Law* 395 (6th ed. 2000).
[45] Bruce W. Sanford, *Libel and Privacy* § 6.5, at 240.7 (2d ed. 2003).
[46] *Id.* § 6.5, at 240.7-240.8.
[47] 556 F.2d 113 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977).
[48] *Id.* at 117.
[49] *Id.*
[50] *Id.* at 118.
[51] Edwards v. Nat'l Audubon Soc'y, 423 F. Supp. 516 (S.D.N.Y. 1976), *rev'd*, 556 F.2d 113 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977).
[52] *Edwards*, 556 F.2d at 119. The U.S. Supreme Court extended the "actual malice" rule to defamatory publications concerning "public figures." *See* Curtis Publ'g Co. v. Butts & Associated Press v. Walker, 394 U.S. 131 (1969).
[53] *Id.* at 119-20.
[54] *Id.* at 120.
[55] *Id.* at 115.
[56] *Id.* at 120 (emphasis added).
[57] *Id.*
[58] *Id.*
[59] *Id.* at 115.
[60] *Id.* at 120.
[61] *Id.* at 121 (citation omitted).
[62] *DiSalle*, 13 Media L. Rep. (BNA) at 1881.
[63] Stewart & Michelson, *supra* 16, at 17.
[64] Russomanno & Youm, *supra* 16, at 470-71 (emphasis added).
[65] The neutral reportage cases were identified by the author's LEXIS search on March 30, 2003, by the "segment searching" function. The search was restricted to "Edwards v. National Audubon," "libel! or slander! or defam!," and "date after May 26, 1997." The LEXIS search yielded 8 case citations. However, one of them was a lower court decision, which was vacated on appeal. *See* Norton v. Glenn, 797 A.2d 294 (Pa. Super. Ct. 2002), and Wolfe v. Glenn, 51 P. D. & C. 4th 46 (Pa. Chesty County Ct. 2001). Any redundancy or "double counting" was averted by discounting the lower court decisions.
[66] 30 Media L. Rep. (BNA) 1637 (Pa. Super. Ct. 2002), *cert. granted*, 815 A.2d 1040 (Pa. 2003).
[67] Liptak, *supra* note 20, at A8.
[68] 26 Media L. Rep. (BNA) 2505 (Cal. 1998), *cert. denied*, 526 U.S. 1114 (1999)
[69] Debora K. Kristensen, "California Narrows Application of Neutral Report Privilege," *Comm. Law.*, Spring 1999, at 10.
[70] *Khawar*, 26 Media L. Rep. (BNA) at 2515.
[71] *Id.*
[72] *Id.* at 2513.
[73] Khawar v. Globe Int'l, Inc., 51 Cal. App. 4th 14, 20 (1996).
[74] *Id.* at 28.
[75] *Id.* at 30 (citation omitted).
[76] *Id.* at 29 (quoting Barry v. Time, Inc., 584 F. Supp. 1110, 1127 (N.D. Cal. 1984)).
[77] *Id.* at 22.
[78] *Khawar*, 26 Media L. Rep. (BNA) at 2509.
[79] *Id.* at 2510.
[80] *Id.*
[81] *Id.* at 2511 (quoting Edwards v. Nat'l Audubon Soc'y, 556 F.2d 113, 120 (2d Cir. 1977)).
[82] *Id.* at 2512.
[83] *Id.*
[84] *Id.* at 2513.
[85] *Id.* at 2514.
[86] *Id.* at 2514-15.
[87] 29 Media L. Rep. (BNA) 1129 (2d Cir. 2000).
[88] *Id.* at 1130-31.
[89] *Id.* at 1131.
[90] *Id.* at 1129. The "common-interest" or "self-interest" privilege at New York's common law "affords qualified protection to defamatory "communication[s] made by one person to another upon a subject in which both have an interest" or "to a speaker's communication designed to protect the speaker's own legitimate interests." *Id.* at 1132-33.
[91] *Id.* at 1134.
[92] *Id.*
[93] 379 N.Y.2d 196 (1975).
[94] *Id.* at 199.
[95] *Konikoff*, 29 Media L. Rep. (BNA) at 1137.
[96] *Id.* at 1138 (emphasis added).
[97] *Id.* at 1138 n.11.
[98] Sack, *supra* note 7, § 7.3.2.4.6.2, at 7-51.

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[99] *See* Hogan. v. Herald Co., 444 N.E.2d 1002 (N.Y. 1982).
[100] 30 Media L. Rep. (BNA) 1637 (Pa. Super. Ct. 2002).
[101] *Id.* at 1637.
[102] *Id.* at 1638 n.3.
[103] *Id.* at 1639.
[104] *Id.* at 1638.
[105] *Id.* at 1639.
[106] *Id.* at 1638-39.
[107] *Id.*
[108] 583 F.2d 1221 (3d Cir. 1979).
[109] *Norton,* 30 Media L. Rep. (BNA) at 1639.
[110] *Id.*
[111] *Id.* at 1638 n.4 (discussing DiSalle v. P.G. Publ'g Co., 544 A.2d 1345 (Pa. Super. Ct. 1988)).
[112] *Id.* at 1638 n.5 (citing DiSalle v. P.G. Publ'g Co., 544 A.2d at 1354-1355)).
[113] *Id.* at 1639-40 (Montemuro, J., concurring).
[114] *Id.* at 1640.
[115] *Id.*
[116] *Norton,* 815 A.2d 1040 (Pa. 2003) (allowance of appeal granted).
[117] 965 F. Supp. 511 (S.D.N.Y. 1997).
[118] *Id.* at 515.
[119] *Id.* at 519.
[120] *Id.* at 520.
[121] *Id.* (citation omitted).
[122] 16 Media L. Rep. (BNA) 2401 (D.D.C. 1989).
[123] 10 Media L. Rep. (BNA) 1809 (N.D. Cal. 1984).
[124] *See* Russomanno & Youm, *supra* note 16, at 473-74.
[125] 29 Media L. Rep. (BNA) 2210 (Ark. 2001)
[126] *Id.* at 2211.
[127] *Id.* at 2213-14.
[128] 22 Media L. Rep. (BNA) 2046 (Ga. Super. Ct. 1994).
[129] 10 Media L. Rep. (BNA) 1809 (N.D. Cal. 1984).
[130] Sack, *supra* note 7, § 7.3..2.2.1, at 7-13 to 7-7.16
[131] *Lawton,* 22 Media L. Rep. (BNA) at 2052 (emphasis added) (brackets in original).
[132] Association of the Bar of the City of New York, Committee on Communications and Media Law, "The Neutral Report Privilege," 21 *Comm. & L.* 1, 2 (June 1999).
[133] Elder, *supra* 26, § 3:7. at 71.
[134] 639 F.2d 54 (2d Cir. 1980).
[135] *Sullivan*, 376 U.S. at 288.

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PERSONAL JURISDICTION OVER MEDIA LIBEL CASES IN THE INTERNET AGE

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ABSTRACT

Title: Personal Jurisdiction Over Media Libel Cases In The Internet Age.

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When the Internet edition of a newspaper or magazine is published, it is instantly available to a worldwide audience. Potentially it opens the publication to libel suits in any forum. This paper explores the evolving United States law of personal jurisdiction over Internet publishers and journalists in libel actions. Federal appeals court decisions in *Young v. New Haven Advocate* and *Revell v. Lidov* are analyzed. The decisions are victories for the press. Nevertheless, some second-guessing of editorial decisions by editors is inevitable.

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Big Stone Gap and its fewer than 5,000 residents nestle in the Appalachian hills of southwest Virginia. In 1999 the State of Virginia opened Wallens Ridge State Prison, a so-called super-maximum security prison, in the bucolic community. The facility, which can house 1,200 prisoners, provided 400 jobs for Big Stone Gap. Such was the size of the prison that an entrepreneurial Virginia contracted with other states to house many of their felons. Connecticut sent 500 mostly African-American and Hispanic convicts to Wallens Ridge. Harsh conditions, including racial epithets and use of electric-shock stun guns by mostly white guards, drew condemnation of the prison from Amnesty International and other human rights groups.[1] Two inmates from Connecticut died. One of the deaths came after a skirmish with guards. While the American Correctional Association found the prison in compliance with its standards, Virginia refused to permit some Connecticut public officials and advocacy groups to tour the prison. Finally, under pressure from a lawsuit by the American Civil Liberties Union, Connecticut removed its convicts from Wallens Ridge.[2]

Among the newspapers which covered the controversy over Wallens Ridge were the *Hartford Courant*, Connecticut's largest newspaper, and the *New Haven Advocate*, a weekly appealing to upscale readers. The *Courant* is owned by media giant Tribune Co.[3] The *Advocate* is part of New Mass. Media Co., which publishes four other New England weeklies. During 2000 the *Courant* published three columns,[4] written by Amy Pagnozzi, and the *Advocate* printed one news article, written by reporter Camille Jackson,[5] that became grist for a libel suit by Wallens Ridge Warden Stanley Young.[6] Neither the *Courant* nor the *Advocate* sent reporters to Big Stone Gap for the stories. Their articles were written and edited in Connecticut. Their sourcing in Virginia was limited to telephone interviews with a spokesman for the Virginia Department of Corrections, and others. The stories contained information and quotes provided by Connecticut officials who had visited the prison and talked to Young in his office and from letters of Connecticut inmates. The stories were posted on the newspapers' Internet sites.[7] The *Courant* has eight mail subscribers in Virginia.[8] The *Advocate* has no subscribers in Virginia. There is no way to determine how many Virginia residents read the stories on the Internet.[9]

After viewing the articles on the Internet, Young sued the newspapers and the journalists who wrote the articles for libel in federal district court at Big Stone Gap.[10] He claimed the articles "conveyed to the community at large that Young was a racist who advocates and tolerates racism and abuse of inmates by correctional officers under his control."[11] Pagnozzi's columns were based on letters sent home by Connecticut inmates who alleged cruelty by guards. The columnist called Wallens Ridge a "cut-rate gulag," but none of her columns mentioned Young.[12] Jackson's story described alleged harsh conditions at Wallens Ridge and said the distance to southwest Virginia made visits by families of prisoners difficult or impossible. She mentioned a lawsuit by inmates alleging a lack of proper medical care and denial of religious privileges. Jackson quoted a Connecticut state senator as expressing concern about the Confederate Civil War memorabilia he had seen during a visit to the warden's office.[13] The libel suit would be a mundane one except for the fact that it was filed in Big Stone Gap where residents do not read the *Courant* or *Advocate* and would have difficulty obtaining copies of either paper. Yet, because even remote areas have access to the Internet, the stories were easily available to residents of southwestern Virginia, although it is doubtful that they would have known of their publication unless someone called it to their attention.

Bulletin boards on the Internet permit any member of the public to publish information and opinion to the world. They are a Godsend for conspiracy theorists who claim United States security agencies are involved in events ranging from the assassination of President John F. Kennedy to airline disasters. One such theorist is Hart G. W. Lidov, an assistant professor of pathology and neurology at Harvard Medical School, whose girlfriend died in the explosion of Pan American Flight 103 over Lockerbie,

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[1] Amnesty International, "Abuses continue unabated? Cruel and inhumane treatment at Virginia supermaximum security prisons," May 5, 2001. http://amnesty.org/ai.nsf/Recent/AMR510652001/Open (last accessed June 30, 2003).

[2] Timberg, Craig, "Connecticut Pulls Prisoners From Wallens Ridge" and "Documents Show Use of Force at Va. Prison," Washington Post, July 25, 2001, and July 31, 2001; "A Troubling Suit," Connecticut Law Tribune, Feb. 12, 2001. See also Timberg, Craig, "Prison Guards Charged in Attack; Va. Watchdogs Cite Racial Tensions," Washington Post, Dec. 14, 2001.

[3] Chicago-based Tribune Co., in addition to its television and radio holdings, also owns the Chicago Tribune, Los Angeles Times, Baltimore Sun, Long Island Newsday, Orlando Sentinel and South Florida (Fort Lauderdale) Sun-Sentinel.

[4] The columns were headlined "Prison Policy Cost A Life, But Goes On," "Treatment Of Inmates An Outrage," and "Any Time Is Bad Time In Virginia."

[5] The article described a lawsuit by Connecticut inmates to compel Warden Stanley Young to remove Civil War memorabilia from his office.

[6] Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002), *reversing* 184 F.Supp.2d 498 (W.D.Va. 2001).

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[7] 315 F.3d 256, 259.

[8] Id.

[9] "Appeals court takes up Internet libel jurisdiction," USA Today, June 4, 2002.

[10] 184 F.Supp.2d 498.

[11] Id at 501.

[12] 315 F.3d 256, 259.

[13] Id.

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Scotland, in 1988. In 1999 Lidov posted an article on the *Columbia Journalism Review* bulletin board that alleged officials of intelligence agencies in President Ronald Reagan's administration had been warned that Iranian-paid terrorists would plant a bomb on Flight 103 in retaliation for the downing of an Iranian airliner by the USS Vincennes earlier in 1988. As part of the Iran-Contra conspiracy, the article claimed, the United States kept quiet about the Flight 103 plot because it did not want to torpedo efforts to improve relations with Iran. Lidov alleged that the United States made sure State Department and intelligence agency employees were not on the flight.[14] The article was posted on the *CJR* bulletin board because it asserted the American news media cooperated in covering up American involvement.[15]

Oliver "Buck" Revell, a 30-year veteran, was associate director of the Federal Bureau of Investigation in charge of counter-terrorism activities at the time of the Flight 103 explosion. Lidov charged that Revell arranged for key government officials to miss being on the flight. Moreover, Lidov alleged, "(I)t is only the final twist that he appears to have used the information to get his own son off Pan Am 103."[16] After his retirement from the FBI, Revell moved to Texas where he became chairman of the Greater Dallas Crime Commission and president of the Law Enforcement Television Network. Upon learning of the article, which appeared only on *CJR*'s bulletin board and was not published in the magazine's print edition, Revell sued for libel. Revell named Lidov, a resident of Massachusetts, and Columbia University, which is domiciled in New York, as defendants.[17]

Historically, with exceptions such as *USA Today* and the *Wall Street Journal* and supermarket tabloids, newspapers in the United States have lacked significant nationwide circulation. A few have circulated statewide, but most have limited circulation to the market area of department stores and other large advertisers. The Internet has changed the potential audience for newspapers. Most of the 1,500 daily newspapers and many of the 8,200 weeklies in the United States now publish Internet editions. That makes their news stories immediately available anywhere. It also potentially can hale them into court far from the communities in which they publish. While that may not be too burdensome for major dailies, particularly if they are part of a nationwide group, it can be onerous financially for small dailies and weeklies. The annual profits of many small newspapers are less than the six-figure legal expenses that can be incurred in fighting libel suits. In the same legal boat as small dailies and weeklies is the wide variety of Internet-only publications. These range from Matt Drudge's political column, made famous during President Clinton's impeachment battle,[18] to a cyberspace news site devoted to the Ford Mustang.[19]

The Internet is a global interconnected system of computers that allows "tens of millions of people to communicate with one another and to access vast amounts of information from around the world."[20] It is largely unregulated. Just where the Internet is located for legal jurisdiction defies traditional definition. As one court has noted:

> The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps "no there there," the "there" is everywhere where there is Internet access. When business is transacted over a computer network via a Web-site accessed by a computer in Massachusetts, it takes place as much in Massachusetts, literally or figuratively, as it does anywhere.[21]

Of course, just as consumers conduct business over the Internet from where they access it, so do readers receive news from the Internet from where they view the computer screen.

In 2002 about 182 million people in North America used the Internet. Globally more than 580 million people had access.[22] Key features of the Internet are that it is user-driven and has low entry barriers for those who want to publish on it. More than 71 percent of Americans used the Internet in 2002.[23] The impact of the Internet as a source of news is growing. The Pew Research Center for the People and the Press reported that in 1998 one-third of all Americans accessed the Internet for news.[24] Other researchers reported 55 percent went to the Internet in 1999 for news.[25] Both groups of

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[14] Lidov's article has been removed from the *CJR* bulletin board. It can be accessed now at http://www.geocities.com/CapitolHill/5260/hartfinal.html (last accessed June 30, 2003).

[15] Id.

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[17] Revell v. Lidov, 2001 U.S.Dist [illegible] (N.D.Tex.) *affirmed* 317 F.3d 467 (5th Cir. 2002). See *103-Victims and Columbia Journalism School*, Dallas Observer, July 6, 2000.

[18] Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C. 1998).

[19] Ford Motor Co. v. Lane, 67 F.Supp.2d 745 (E.D.Mich. 1999).

[20] Reno v. ACLU, 521 U.S. 844, 850 (1997).

[21] Digital Equipment Corp. v. Altavista Technology, Inc., 960 F.Supp. 456, 462 (D.Mass. 1997).

[22] "Global Internet Penetration," New Media Age, August, 2002.

[23] The UCLA Internet Report, *Surveying the Digital Future: Year Three*, UCLA Center for Communication Policy, February, 2003, 17.

[24] Pew Research Center for the People and the Press, *Internet Sapping Broadcast News Audience*, June 11, 2000.

[25] Stempel III, Guido H., et al, *Relation of Growth of Use of the Internet to Changes in Media Use from 1995 to 1999*, 77 Newspaper Research J. 71 (2000).

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researchers found use of traditional media such as newspapers, television and news magazines declined during the study periods.[26] Internet editions have raised newspaper advertising revenue.[27]

The global reach of the Internet brings into play the area of law known as *in personam* jurisdiction.[28] Historically, as the United States Supreme Court held in *Pennoyer v. Neff*,[29] a court could enforce a judgment against an out-of-state person only if it had effected service on him by his physical presence within territorial limits of the forum. Service by publication on out-of-staters was prohibited by the due process clause of the Fourteenth Amendment.[30] As it became clear that the rule did not make sense in a nationalized economy, the Court held in *International Shoe Co. v. Washington* that a person, including a legal entity such as a newspaper, must have enough "minimum contacts with (a state) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[31] Otherwise, constitutional due process under the Fourteenth Amendment is violated. In the wake of decisions such as *International Shoe*, states enacted long-arm statutes empowering their courts to take jurisdiction over out-of-state persons. Plaintiffs bear the burden of proving a *prima facie* case of personal jurisdiction under constitutional due process and long-arm statutes.[32] The Court recognized that technological progress demanded change in personal jurisdiction law.

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. Washington*. But it is a mistake to assume this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimum contacts" with that State that are a prerequisite to its exercise of power over him.[33]

State long-arm statutes define the type of contacts that permit their courts to take jurisdiction over out-of-state persons.[34] Federal courts must look to the jurisdiction law of the states in which they are located.[35] Generally long-arm reach, including that involving the Internet, can be defined through analysis of commercial transactions.[36] If a person has continuous and systematic contacts with a state, the state can exercise general *in personam* jurisdiction. Such contacts need not be related to the alleged wrong of a suit.[37] More common in tort suits is exercise of specific jurisdiction. Here a person must have made contacts that purposely avail himself of conducting activities directed at a state and those activities must be related to his cause of action.[38] Moreover, exercise of specific jurisdiction must be constitutionally reasonable.[39] Ordinarily states interpret their long-arm statutes as extending to the maximum reach consistent with the due process clause.[40] Jurisdiction of libel suits based on Internet publication is more complicated because the place of gathering of news, writing of stories, and uploading of the stories can be far distant from the residence of the person who believes that he has been defamed. That can cause substantial inconvenience to both those who sue and to the media and journalists who are sued.

The defamation suits by Stanley Young and Oliver "Buck" Revell have produced the most significant law yet on *in personam* jurisdiction as applied to Internet publications. In *Young v. New Haven Advocate*, a federal

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[26] Radio news was an exception in the Stempel, et al study.

[27] Madore, James T., *Web sites give newspaper ad sales needed lift*, Chicago Tribune, Dec. 16, 2002.

[28] Personal jurisdiction is the authority of a court to require a person to appear and defend a claim against it or suffer a default judgment against it. Courts in states where a defendant resides ordinarily will enforce such judgments under the full faith and credit clause of the United States Constitution.

[29] 95 U.S. 714 (1877).

[30] Id at 733.

[31] 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[32] Omni Capital International v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987).

[33] Hanson v. Dencla, 357 U.S. 235, 251-252 (1958) (internal citations omitted).

[34] This article does not consider jurisdiction of courts of foreign nations over United States media. While foreign courts do assert jurisdiction, e.g., Berezovsky v. Michaels, (2000) 2 All E.R. 986 (H.L.), American courts will not recognize foreign libel judgments where First Amendment protections have not been applied. Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1996), Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. 1992). See Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 Hastings Comm. & Ent. L.J. 2135 (1994), and *The Interaction Between American and Foreign Libel Law*, (2000) I.C.L.Q. 131.

[35] ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 622 (4th Cir.1997).

[36] CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

[37] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-416 (1984).

[38] CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1267 (6th Cir. 1996).

[39] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-475 (1985).

[40] ALS Scan, Inc. v. Digital Services Consultants, Inc., 293 F.3d 707, 710 (4th Cir. 2002).

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district court rejected a challenge to its jurisdiction and held the *Courant* and *Advocate* must defend against the libel suit in Big Stone Gap.[41] The United States Court of Appeals for the Fourth Circuit reversed.[42] In *Revell v. Lidov* a federal district court refused to take jurisdiction.[43] The decision was affirmed by the United States Court of Appeals for the Fifth Circuit.[44] This paper reviews the law on personal jurisdiction in libel actions as applied generally to the news media and in particular to Internet journalism. Then it analyzes *Young* and *Revell* as leading Internet cases on specific personal jurisdiction over news media. The article concludes that *Young* and *Revell* were correctly decided by the appeals courts, but then discusses the difficulties the news media still face in the age of the Internet.

Legal Background On News Media Jurisdiction

In analyzing application of the law on personal jurisdiction to the news media, a two-step process is necessary. First, state long-arm law must be dissected. Most states have expansive long-arm statutes. So, ordinarily, statutory jurisdiction is found. Then a court must consider whether jurisdiction is constitutional under the due process clause of the Fourteenth Amendment. If general *in personam* jurisdiction is being asserted, a defendant must have continuing sufficient minimum business or other contacts with a state. Assertion of specific personal jurisdiction requires a three-pronged analysis: (1) a defendant must have sufficient minimum contacts with the forum state, (2) the claim asserted against a defendant must arise from the contacts, and (3) exercise of jurisdiction must be reasonable.[45] The reasonableness prong relates to the fair play mandate of *International Shoe*.[46] Courts rely on a purposeful availment test in deciding whether there are sufficient minimum contacts to confer jurisdiction that is consistent with due process.[47] The purposeful availment test requires at least one of the parties to a lawsuit to have sufficient minimum contacts with the forum state.

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[41] 184 F.Supp.2d 498.
[42] 315 F.3d 256.
[43] *Revell* at LEXIS 3133.
[44] 317 F.3d 467.
[45] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); Ballard v. Savage, 65 F.3d 1495 (9th Cir. 1995)
[46] *International Shoe* at 316.
[47] Ashani Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 109 (1987) (quoting *Burger King* at 475).

In the context of the news media and purposeful availment, the United States Supreme Court has decided two cases. In cases handed down on the same day, the United States Supreme Court considered the constitutional due process implications as applied to defamation actions against the media in *Keeton v. Hustler Magazine, Inc.*[48] and *Calder v. Jones*.[49] *Keeton* is the ruling case on general personal jurisdiction over out-of-state media. *Calder* is the binding authority on specific personal jurisdiction. In media libel cases, the Court ruled, purposeful availment can be found where the effects of the alleged defamations foreseeably will have an impact in a forum state. In *Calder* the Court fashioned an effects test[50] which sets media libel cases apart from other types of tort actions where specific personal jurisdiction is at issue.

Kathy Keeton, a New York resident, was the consort of Robert Guccione, publisher of *Penthouse* magazine. Her libel suit originated in the animosity toward each other of Guccione and Larry Flynt, publisher of *Hustler*. *Hustler* mentioned Keeton in what she considered a defamatory way in an article degrading Guccione. After missing the deadline for filing a defamation suit under Ohio's one-year statute of limitation, Keeton filed a libel suit in New Hampshire against *Hustler*. New Hampshire has a six-year statute of limitation. The magazine was then domiciled in Ohio, but *Hustler* had a monthly circulation of 10,000 to 15,000 copies in New Hampshire. *Hustler* claimed the lack of residence of the parties and what it described as small circulation constitutionally barred personal jurisdiction in New Hampshire.[51] The First Circuit Court of Appeals agreed.[52]

Hustler advanced three rationales in claiming a grant of general personal jurisdiction would violate due process. First, the single uniform publication rule would allow New Hampshire, where the magazine had a small circulation, to decide damages for all states. Second, to allow Keeton to avoid Ohio's statute of limitations by going to New Hampshire was constitutionally unfair. Third, *Hustler* lacked sufficient minimum contacts with New Hampshire to confer jurisdiction. Unanimously reversing the appeals court, the Court said the three rationales "whether considered singly or together" were not weighty enough to "defeat jurisdiction otherwise proper under both New Hampshire law and the Due Process Clause."[53] The

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[48] 465 U.S. 770 (1984).
[49] 465 U.S. 783 (1984).
[50] Id at 788-789.
[51] *Keeton* at 772.
[52] Keeton v. Hustler Magazine, Inc., 682 F.2d 33 (1982).
[53] *Keeton* at 775.

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Court rejected "categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause."[54]

The Court found the uniform single publication rule raised no due process barrier. It concluded that New Hampshire had a particular interest in exercising jurisdiction over those who commit tortious harm in its territory and that interest extends to nonresidents:

> False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens.[55]

The Court said New Hampshire also may protect a nonresident from injury that "may create a negative reputation among residents of a jurisdiction where the plaintiff's previous reputation was, however small, at least unblemished."[56]

The Court dismissed the difference between the statutes of limitations in Ohio and New Hampshire as having nothing to do with jurisdiction. Rather, it is a choice of law issue.[57] The Court said residency of either Keeton or *Hustler* was not necessary to meet the minimum contacts requirement for jurisdiction. Where *Hustler* "has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine."[58] The Court described the 10,000 to 15,000 copies sold monthly as substantial and as sufficient minimum contacts.[59]

It was in *Hustler*'s sale of copies in New Hampshire that the Court found purposeful availment. The test was not applied to Keeton. In fact, the Court stated, "we have not to date required a plaintiff to have 'minimum contacts' with the forum state. . ."[60] It was enough, the Court concluded, that *Hustler* had significant and continuing circulation in New Hampshire. While secondary to its analysis, the Court did not ignore effect of the alleged libels

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[54] Id at 781 n12.
[55] Id at 776 (italics in opinion).
[56] Id at 776-777.
[57] Id at 778.
[58] Id at 781.
[59] Id.
[60] Id at 779.

on New Hampshire readers. The Court noted that "libel is generally held to occur wherever the offending material is circulated."[61]

The Court adopted an effects test in *Calder v. Jones*. *Calder* arose when the *National Enquirer*, a Florida-based weekly tabloid, published an article about actress Shirley Jones. The article claimed Jones, a California resident, was so drunk that Marty Ingels, her husband, had to drive her to work. Jones sued the *Enquirer*, John South, author of the article, and Ian Calder, the tabloid's editor, for libel in California. South and Calder challenged any personal jurisdiction of California courts. Jurisdiction over the *Enquirer*, which had continuous business contacts with California, was not at issue in *Calder*. About 600,000 of the *Enquirer*'s weekly circulation of more than five million copies were sold in California. The California circulation was twice as large as that in any other state. The article was written, edited and published in Florida. While South, the author, frequently traveled and made phone calls to California, his only contacts with the state on the story were phone calls to sources there and to Ingels to solicit comments.[62] Calder edited the story and refused to run a retraction after publication.[63] A state appellate court ruled that specific personal jurisdiction lay in California.[64]

The Court said an inquiry into specific personal jurisdiction focuses on "the relationship among the defendant, the forum, and the litigation."[65] While lack of residency or other contacts of a plaintiff in a state would not defeat jurisdiction, "they may be so manifold as to permit jurisdiction when it would not exist in their absence."[66] As to Jones' residence and work in California, the Court stated:

> The allegedly libelous article concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of (Jones') emotional distress and the injury to her professional

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[61] Id at 778. The statement is best interpreted as referring to where the harm occurs as contrasted to where the tortious act of publishing the libel takes place. Moncrief v. Lexington Herald-Leader Co., 807 F.2d 217, 219 (D.C.Cir. 1986).
[62] *Calder* at 785-786.
[63] Id at 786.
[64] Jones v. Calder, 187 Cal. Rptr. 825 (1982).
[65] *Calder* at 788, quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977).
[66] Id.

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reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm.[67]

Thus, held the Court, jurisdiction in California was proper based on the effects of the Florida conduct.[68]

The Court rejected the contentions of South and Calder that because they were not responsible for the *Enquirer*'s circulation in California they therefore were not subject to the state's jurisdiction. The Court said their "intentional, and allegedly tortious, actions were expressly aimed at California."[69] South and Calder knew the article would have a "potentially devastating impact" on Jones and the "brunt of that injury" would occur in California where Jones lived and worked and the tabloid had its largest circulation.[70] The Court said that jurisdiction over South and Calder resulted from their intrusion into California and not their status as *Enquirer* employees or the weekly's business activities in the state. The reporter and editor were described as "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."[71] South and Calder had argued that they should not be judged by the *Enquirer*'s activities with California. The Court agreed, but said that did not protect them from California's jurisdiction. Rather, the Court stated, each defendant's "contacts with the forum State must be assessed individually."[72] In *Calder*, the Court asserted, South and Calder were "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."[73]

The Court dismissed the plea that dragging the tabloid's employees into a distant court would chill newsgathering and violate the First Amendment. The press is sufficiently protected by the substantive constitutional law of defamation,[74] the Court said, and to consider the First Amendment "at the jurisdictional stage would be a form of double

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[67] Id at 788-789.
[68] Id at 789.
[69] Id at 789.
[70] Id at 789-790.
[71] Id at 790.
[72] Id.
[73] Id.
[74] Id, citing New York Times v. Sullivan, 376 U.S. 254 (1964), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

counting."[75] The Court noted that it had refused in other contexts to provide special procedural protections in defamation actions.[76]

In *Calder* the Court relied on the effects test to demonstrate minimum contacts/purposeful availment. This reflects defamation's nature as an intentional tort. An intentional tort is most often a one-time event. The effects test looks at foreseeable and targeted harm. The effects test has three prongs: (1) an allegation of a tortious injury, (2) the plaintiff felt the brunt of the harm in the forum and thus the forum was the focal point of the harm sustained as a result of the alleged tort, and (3) the defendant purposely aimed his tortious conduct at the forum and thus made the forum the focal point of the tortious activity.[77] Generally federal circuit courts of appeals have applied the effects test when finding jurisdiction in defamation cases.[78] However, it is clear that *Keeton* permits general personal jurisdiction in media cases based on significant business or other activities within a state. A media outlet need not target the state in those activities. *Hustler* had greater circulation in other states and thus did not target New Hampshire. By contrast, under *Calder* a defendant must target the state and the harm must occur in the state. Ordinarily, but not necessarily, the plaintiff will be a resident of the forum.

Both *Hustler* and the *Enquirer* are periodicals that are circulated nationally and have national audiences. What *Keeton* and *Calder* did not involve were typical United States newspapers or local television news programs. Most often newspapers are only circulated locally and their content aimed at a local readership. Television stations aim their news programs at regional audiences.[79] Thus, in respect to newspaper readership and television audiences, *Keeton* and *Calder* are atypical. Prior to *Keeton* and *Calder* some lower court decisions found that *in personam* jurisdiction raised First Amendment concerns when the news media were defendants.[80] The Court in *Keeton* and *Calder* emphatically ruled out the First

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[75] Id.
[76] Id at 791, citing Herbert v. Lando, 441 U.S. 153 (1979), and Hutchinson v. Proxmire, 443 U.S. 111 (1979).
[77] Imo Industries, Inc. v. Kiekert AG, 155 F.3d 254, 265-266 (3d Cir. 1998). But see Janmark, Inc. v. Reidy, 132 F.3d 1200 (7th Cir. 1997) (state in which victim suffers injury may take jurisdiction).
[78] *Calder* has been applied in intentional tort cases other than defamation. See *Imo*; Far West Capital, Inc. v. Towne, 46 F.3d 1071 (10th Cir. 1995); Bancroft and Masters, Inc. v. Augusta National Golf Club, 223 F.3d 1082 (9th Cir. 2000).
[79] Of course, cable and satellite news programs distributed nationwide could raise jurisdictional issues similar to those found in *Keeton* and *Calder*.
[80] See, e.g., New York Times v. Connor, 365 F.2d 567 (5th Cir. 1966); Buckley v. New York Times, 338 F.2d 470 (5th Cir. 1964).

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Amendment as a factor in deciding whether a forum has personal jurisdiction.

The North Dakota Supreme Court applied the *Calder* effects test in an Internet context in *Wagner v. Miskin*.[81] The case arose when Glenda Miskin, a student at the University of North Dakota, developed an animosity toward John Wagner, her professor in a physics class. She published libelous personal and professional comments about Wagner on www.undnews.com, her website. The court affirmed a jury verdict awarding Wagner $3 million in compensatory damages for defamation and interference with business relationships.[82] Besides the web address itself, the court found ample evidence the focus of her website was the University of North Dakota. The evidence included articles about Wagner, his attorney, litigation between her and Wagner in North Dakota courts and links on the website to articles relating to the University of North Dakota. The concluded that Miskin "did particularly and directly target North Dakota with her website, specifically North Dakota resident John Wagner."[83]

Lower Court Rulings On Jurisdiction

Decisions of lower courts on specific personal jurisdiction in pre-Internet newspaper cases are precursors of decisions that involve the Internet. The lower courts reached mixed decisions on specific personal jurisdiction in those decisions under long-arm statutes[84] and/or whether conferral of jurisdiction would violate constitutional due process.[85] Typically long-arm statutes confer jurisdiction where a person (1) causes tortious injury by an act or omission in a state, or (2) causes tortious injury in a state by an act or omission outside the state if the person regularly does or solicits business, or engages in any other persistent course or conduct, or derives substantial revenue from goods used or consumed or services rendered in the

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[81] 660 N.W.2d 593 (N.D. 2003).

[82] Id at 599.

[83] Id.

[84] Moncrief v. Lexington News-Leader, 807 F.2d 217 (D.C.Cir. 1985); Margoles v. Johns, 483 F.2d 1212 (D.C.Cir. 1973); Ticketmaster-New York v. Alioto, 26 F.3d 201 (1st Cir. 1994) (dicta).

[85] See *Ticketmaster*; Hugel v. McNell, 886 F.2d 1 (1st Cir. 1989); Chaiken v. VV Publishing Corp., 119 F.3d 1018 (2d Cir. 1997); Blue Ridge Bank v. Veribanc, Inc., 755 F.2d 371 (4th Cir. 1984); Buckley v. New York Times, 338 F.2d 470 (5th Cir. 1964); New York Times v. Connor, 365 F.2d 567 (5th Cir. 1966); Wilson v. Belin, 20 F.3d 644 (5th Cir. 1994); Gordy v. The Daily News, 1996 U.S.App. LEXIS 27861 (9th Cir.); Core-Vent v. Nobel Industries, 11 F.3d 1482 (9th Cir. 1993); Roth v. Garcia Marquez, 942 F.2d 617 (9th Cir. 1991); Sinatra v. National Enquirer, 854 F.2d 1191 (9th Cir. 1988); Army Times v. Watts, 730 F.2d 1398 (11th Cir. 1984); Stepanian v. Addis, 782 F.2d 902 (11th Cir. 1986); Madara v. Hall, 916 F.2d 1510 (11th Cir. 1990); McFarland v. Esquire Magazine, 74 F.3d 1296 (D.C.Cir. 1996); *Moncrief*;

state.[86] The first provision relates to specific personal jurisdiction; the second to general personal jurisdiction. Other states, such as that of California, provide that the state "may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[87] The District of Columbia has a judicially carved exception for newsgathering to the long-arm reach of its statute.[88] Because of the expansive nature of long-arm statutes, even if not as explicit as that of California, most courts have decided *in personam* jurisdiction on constitutional grounds. Selected decisions from the first and ninth circuit courts of appeals illustrate the mixed results in post-*Keeton* and *Calder* cases.

The United States Court of Appeals for the First Circuit in *Ticketmaster-New York* failed to find specific personal jurisdiction. In *Ticketmaster-New York* the *Boston Globe* published a story about Ticketmaster's pricing policies. The story quoted Joseph Alioto, an attorney and former San Francisco mayor, as alleging Ticketmaster maintained a monopoly and high prices in California through kickbacks.[89] Alioto's only contact with Massachusetts was a phone interview initiated by the journalist who wrote the story. Saying that divining personal jurisdiction is "more an art than a science,"[90] the court denied personal jurisdiction.[91] In establishing constitutionality under the due process clause, the court said Ticketmaster had to show its cause of action was related to Alioto's contacts with Massachusetts and that Alioto had purposely availed himself of the privilege of doing business in the state.[92] Further, the court said, it must decide that granting jurisdiction would not offend fair play and substantial justice.[93] The court said the fair play analysis must be based on five factors set forth by the Supreme Court in *Burger King*: (1) the burden to the defendant of appearing; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all states in promoting substantive social policies.[94]

The court said Alioto's comment had only an attenuated relationship to the cause of action. The comment "inflicted no significant injury, except insofar as it led to republication in the ensuing newspaper article---and the form and tone of the republication was not by any stretch of the most active imagination within defendant's control."[95] The keys to purposeful availment, the court stated, are foreseeability of being haled into court in the forum state and voluntariness.[96] The court said purposeful availment in Alioto's case was marginal.[97] The court found that the burden on Alioto of forcing his appearance tipped the constitutional scale.[98] To force Alioto to travel 3,000 miles to a distant forum based on comments made during one unsolicited phone call, the court said, "is so onerous that it renders the exercise of *in personam* jurisdiction unreasonable."[99] In dicta, the court said that the burden of forcing a person to "fly cross-country on the strength of one answered telephone call from a journalist likely would tend to dry up sources of information and thereby impede the press in the due performance of its proper function."[100]

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[86] See, e.g., Va. Code Ann 8.01-328.1(A)(3) and (4).

[87] Cal. Civ. Proc. Code Ann 410.10.

[88] Neely v. Philadelphia Inquirer Co., 62 F.2d 873 (D.C.Cir. 1932). See also Layne v. Tribune Co., 71 F.2d 223 (D.C.Cir. 1934); Founding Church of Scientology v. Verlag, 536 F.2d 429 (D.C.Cir. 1976); *Moncrief*.

[89] *Ticketmaster* at 204. The opinion does not identify to whom the alleged kickbacks were paid.

[90] Id at 206, quoting Donatelli v. National Hockey League, 893 F.2d 459, 468 n7 (1st Cir. 1990).

[91] Id at 212.

[92] Id at 206.

[93] Id.

[94] Id at 206, citing *Burger King* at 477.

The First Circuit decision in *Ticketmaster-New York* contrasted with an earlier one in *Hugel v. McNell* in which it upheld personal jurisdiction. Max Hugel, a New Hampshire businessman, was forced to resign as deputy director of the Central Intelligence Agency as a result of a front page story in the *Washington Post* alleging that he had engaged in illegal securities transactions. The *Post* based its story, disseminated nationwide by wire services and radio-television, on tapes of phone conversations and other information supplied by Sam and Tom McNell, out-of-state former business partners of Hugel. The newspaper's journalists met with the McNells and wrote, edited and published the story in the District of Columbia.[101] The court used a *Calder* analysis and ruled that the "McNells knew that the release of the allegedly false information would have a devastating impact on Hugel, and it can be fairly inferred that they intended the brunt of the injury to be felt in New Hampshire where Hugel had an established reputation as a businessman and public servant."[102] Unlike its observation in *Ticketmaster-New York*, the court said the "intervening actions of the reporters and editors of the *Washington Post* are irrelevant to the question of whether New Hampshire can exert personal jurisdiction over the

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[95] Id at 207.
[96] Id.
[97] Id at 208-209.
[98] Id at 212.
[99] Id.
[100] Id.
[101] *Hugel* at 2.
[102] Id at 5.

McNells."[103] The major difference is that the McNells purposely sought out *Post* journalists while the *Boston Globe* reporter initiated the contact with Alioto.

The contrasting cases of *Gordy v. The Daily News*[104] and *Core-Vent Corp. v. Nobel Industries,*[105] decided by the United States Court of Appeals for the Ninth Circuit, illustrate how *Calder* has been interpreted under California law. Probably *Gordy* illustrates the maximum stretch for exercising personal jurisdiction without violating constitutional due process.

In *Core-Vent* four Swedish doctors published articles about research on dental implants in two medical journals with international circulations. Core-Vent Corp., a California manufacturer of dental implants, claimed the articles defamed it and sued in California courts. The doctors' only contacts with California were occasional visits.[106] In *Gordy* Berry Gordy, founder of Motown Records and a California resident, sued the *New York Daily News* and columnist George Rush for libel over mention of Gordy in an entertainment column. The only contacts with California by the *Daily News* in gathering information for the column were phone calls to Gordy and two other sources. The events reported did not occur in California and the state was not mentioned. The *Daily News*' circulation in California is 13 copies weekdays and 18 copies on Sundays. The *Daily News* does report frequently on the California-based entertainment industry.[107]

The court in *Core-Vent* rejected a claim that the case was analogous to *Calder* under the effects test, although it said it "is a close question."[108] It also dismissed the assertion that the medical journals had enough circulation in California to trigger jurisdiction under *Keeton*. It said that *Core-Vent* involved the four Swedish doctors and not the medical journals and quoted *Keeton* in noting that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him."[109] Unlike *Calder*, the court said the articles were not expressly directed at California and it was unclear that the brunt of the harm was in the state.[110] However, the court conceded that *Calder* possibly could confer jurisdiction because

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[103] Id.
[104] 1996 U.S.App. LEXIS 27861 (9th Cir.).
[105] 11 F.3d 1482 (9th Cir. 1993).
[106] *Core-Vent* at 1483-1484.
[107] *Gordy* at 1-2.
[108] *Core-Vent* at 1486
[109] Id, n3, quoting *Keeton* at 781 n13.
[110] Id.

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the articles were about the product of a California corporation and the doctors allegedly were aware of the California affiliation.[111]

Where the doctors had purposefully had minimum contacts with California, as in *Core-Vent*, the court said it must determine whether granting jurisdiction would be consistent with fair play and substantial justice.[112] The court weighed seven factors in deciding the issue of fair play and substantial justice: (1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendants of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.[113] While recognizing that California "has a strong interest in providing a forum to those who are injured in its state,"[114] the court concluded that "the exercise of jurisdiction would not comport with fair play and substantial justice and would thus be unreasonable."[115] The status of the doctors as foreign nationals was a key consideration of the court, which noted the United States Supreme Court had said a higher standard must be met to hale foreigners before an American court.[116]

In *Gordy* the court said *Calder* was dispositive because the *Daily News* and columnist George Rush "wrote and published their allegedly defamatory column intentionally directing it at Gordy, a California resident."[117] The court distinguished *Core-Vent* where the defamation was targeted at an international corporation that did a worldwide business. It dismissed a comparison between *National Enquirer*'s circulation of 600,000 copies in California in *Calder* and the *Daily News*' circulation of 13 to 18 copies.

> Surely if some New York entity had written only 13 defamatory letters and sent them all to California, we would permit a defamed California resident to sue the entity in California. It is not clear why the distribution of 13 to 18 defamatory copies of a column loses

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[111] Id at 1487.

[112] Id, relying on ***Burger King*** at 476-477 (1985).

[113] Id at 1487-1488.

[114] Id at 1490.

[115] Id.

[116] Id, citing Asahi Metal Industry Company v. Superior Court, 480 U.S. 102 (1987).

[117] *Gordy* at 3.

> magnitude as a contact simply because the *Daily News* does a lot of things elsewhere.[118]

The court's reasoning is tortured. Mailing 13 to 18 letters targets California. The *Daily News*, with a circulation of more than 700,000, is targeting an audience outside California. In fact, the medical journals in *Core-Vent* had a larger circulation in California than the *Daily News*.

Having established minimum contacts, the court turned to the same seven factors it used in *Core-Vent* to assess whether subjecting Rush and the *Daily News* to personal jurisdiction would be fair and just. The court concluded it would meet constitutional reasonableness because they knew Gordy lived in California, their actions foreseeably would have a substantial impact in California, they write and publish California news regularly, and the *Daily News* sends reporters to and circulates newspapers in the state.[119] Probably the court's conclusion reflects a tendency for California law to be more expansive than that in other states.[120]

Curiously, there is a lack of reported cases on *in personam* jurisdiction related to television news. One such case, predating *Keeton* and *Calder*, is *Casano v. WDSU-TV*.[121] Peter J. Casano, a Mississippi attorney, claimed a broadcast by a New Orleans television station falsely accused him of being connected to Mafia racketeers. The court found that the TV station's audience area included about 14,300 television-equipped homes in Mississippi and that it derived substantial advertising revenue from Mississippi businesses.[122] That was sufficient, the court held, for personal jurisdiction over the station in Mississippi.[123]

Internet Media And Jurisdiction

Many decisions on both general and specific personal jurisdiction in Internet cases have looked to *Zippo Manufacturing Co. v. Zippo.Dot.Com*[124] for guidance. In *Zippo* the court said that the varied circumstances of Internet cases dictated that courts use a sliding scale to determine whether to confer personal jurisdiction.

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[118] Id.

[119] *Gordy* at 5.

[120] See, e.g., *Moncrief*; *Margole*; Tavoulareas v. Comnas, 720 F.2d 192 (D.C.Cir. 1983); *Ticketmaster-New York*; *Chaiken*; *Buckley*;*Connor*; *Wilson*.

[121] 313 F.Supp. 1130 (S.D.Miss. 1970).

[122] Id at 1142-1143.

[123] Id at 1145.

[124] 952 F.Supp. 1119 (W.D.Pa. 1997).

> (T)he likelihood that personal jurisdiction can be constitutionally exercised is directly proportional to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.[125]

The *Zippo* sliding scale analysis is best suited to non-media cases, but it contains elements of *Calder* and *Keeton* and some courts have combined it with those cases in decionmaking.

A federal district court in *Barrett v. The Catacombs Press,*[126] a defamation case, surveyed cases on the evolving law of personal jurisdiction on Internet activity. The court found the cases fell into three categories. Generally, jurisdiction has been conferred where the media conduct business transactional activity over the Internet.[127] Ordinarily, jurisdiction has been rejected where a website is passive and "merely provides information to

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[125] Id at 1124 (citations omitted).

[126] 44 F.Supp.2d 717 (E.D.Pa. 1999).

[127] Id at 724-725, citing CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (online contracts between plaintiff and defendant); *Zippo* (contracts with about 3,000 persons and seven Internet providers); Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328 (E.D.Mo. 1996) (creating mailing list by signing up people via website); Gary Scott Int'l, Inc. v. Baroudi, 981 F.Supp. 714 (D.Mass. 1997) (solicited Massachusetts residents via website and had major deal with Massachusetts company); Superguide Corp. v. Kegan, 987 F.Supp. 481 (W.D.N.C. 1997) (state's citizens utilized services and acquired products via website); Thompson v. Handa-Lopez, Inc., 998 F.Supp. 738 (W.D. Tex. 1998) (entering into contracts via Website with residents of forum state).

those who seek it."[128] However, there are exceptions. Some courts have held personal jurisdiction exists even where the websites are passive.[129] A final category encompassed cases in which there were both Internet and non-Internet contacts. Courts found personal jurisdiction in these cases.[130] Almost all of the cases surveyed in *Barrett* were of a nature where general personal jurisdiction was at stake.

In *Barrett*, a Pennsylvania psychiatrist, Stephen Barrett, sued over comments made by an Oregon resident on an interactive website. Over many years Barrett had developed a reputation for exposing health frauds. He was an advocate of fluoridation of water supplies. The website comments attacked him for the advocacy.[131] The court rejected specific personal jurisdiction over the out-of-state website and the Oregon resident who posted the comments. The court distinguished the circumstances from *Calder* where the journalists had aimed their attack at actress Shirley Jones' activities in California and thus triggered jurisdiction in that state's courts. The court said the comments assailed Barrett for his role as a nationwide advocate for fluoridation and Barrett could not "point to any defamatory statements that attack him in his capacity as a Pennsylvania psychiatrist or any postings by the Defendant that intended to target Internet users in Pennsylvania."[132]

Matt Drudge writes *The Drudge Report*, a political/entertainment gossip column that is published only on the Internet. The column was carried on Drudge's website, on *Hotwired*, an Internet offshoot of *Wired* magazine, and on American Online (AOL). Drudge also distributed the column by e-

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[128] Id at 725, citing Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997) (Internet advertisement alone); Transcraft Corp. v. Doonam Trailer Corp., 1997 U.S.Dist. LEXIS 18687 (N.D.Ill.) (advertisement with e-mail address for inquiries); CFOS 2 GO, Inc. v. CFO 2 GO, 1998 U.S.Dist. 8886 (N.D.Cal.) (website with description of business and contact information); Smith v. Hobby Lobby Stores, Inc., 968 F.Supp. 1356 (W.D.Ark. 1997) (advertisement in trade publication on Internet without contract to sell goods or services to citizens of forum state insufficient); ESAB Group, Inc. v. Centricut, L.L.C., 34 F.Supp.2d (D.S.C. 1999) (maintenance of website to sell products). Also, jurisdiction not found under New York's more limited long-arm statute, Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997); Hearst Corp. v. Goldberger, 1997 U.S.Dist. LEXIS 2065 ((S.D.N.Y.).

[129] Id, citing Inset Sys., Inc. v. Instruction Set, Inc., 937 F.Supp. 116 (D.Conn. 1996) (Internet advertisement and toll free number); Telco Communications v. An Apple A Day, 977 F.Supp. 404 (E.D.Va. 1997) (advertising and solicitation over Internet).

[130] Id at 726, citing *Edias*; Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C. 1998); Digital Equipment Corp. v. Altavista Tech., Inc., 960 F. Supp. 456 (D.Mass. 1997); Cody v. Ward, 954 F.Supp. 43 (D.Conn. 1997); Resuscitation Techs., Inc. v. Continental Health Care Corp., 1997 U.S.Dist. LEXIS 3523 (S.D. Ind.); Heroes, Inc. v. Heroes Found., 958 F.Supp. 1 (D.D.C. 1996); American Network, Inc. v. Access America/Access Atlanta, 975 F.Supp. 494 (S.D.N.Y. 1997); Hasbro, Inc. v. Clue Computing, Inc., 994 F.Supp. 34 (D.Mass. 1997).

[131] Id at 720-721.

[132] Id at 729.

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mail to a 1,000-person subscriber list. He received royalties from *Hotwired* and $3,000 monthly from AOL. In August, 1997, Drudge wrote and distributed a column that accused Sidney Blumenthal, a White House aide, of wife-beating. Later Drudge retracted the story and publicly apologized to Blumenthal.[133] Eventually the lawsuit was settled when Blumenthal paid $2,500 to Drudge to cover some legal costs.[134] Drudge, a California resident, challenged the *in personam* jurisdiction of the federal district court in the District of Columbia.[135]

The *Blumenthal* court, relying on case law,[136] found the District of Columbia long-arm statute reaches the outer limits of constitutional due process. Thus, where personal jurisdiction can be exercised under the statute, no constitutional problem arises.[137] The relevant part of the district's statute allows exercise of jurisdiction where tortious harm in the district is caused by an act or omission outside the district and the alleged tortfeasor regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the district.[138] The court found that the harm to Blumenthal's reputation occurred within the district and that the act of writing, publishing and transmitting the alleged libel was done on Drudge's computer in Los Angeles. So the first two prongs of the long-arm statute allowed jurisdiction.[139]

The court said more connections than the first two prongs are required for the district to assert jurisdiction. The court found these connections: Drudge's column is regularly transmitted to district residents,[140] Drudge maintains an e-mail list of subscribers who are district residents, he has solicited contributions and collected money from district residents, he visited the district at least twice, including once for a C-SPAN interview, and he regularly gathers gossip from district residents by telephone, mail and e-mail. The court did a *Zippo* sliding scale analysis. It noted that Drudge's website was an interactive rather than passive one. The various connections and the interactive nature of the website demonstrated that Drudge "engaged in a persistent course of conduct in the District" and exercise of personal jurisdiction "therefore is warranted."[141] The court also did a *Calder* effects analysis. It concluded Drudge's column largely consisted of Washington gossip and rumor, thereby specifically aiming at district readers, and Drudge targeted Blumenthal, whom he knew worked at the White House and lived in the district. Thus, the court held, Drudge "should have had no illusions that he was immune from suit here."[142]

Schnapp v. McBride originated in an article in the *Milwaukee Journal Sentinel* about race-based police brutality in Louisiana. Jake Schnapp, a New Orleans police officer, claimed the article portrayed him "as a racist and an illegally aggressive police officer who was abusive of the rights of the citizenry."[143] As in long-arm statues generally, the Louisiana law requires an out-of-state person to maintain business relations or some other persistent course of conduct to trigger personal jurisdiction of the state's courts.[144] Case law excludes occasional newsgathering as an activity fulfilling the long-arm requirement.[145] The *Journal Sentinel* had sent a reporter to Louisiana to gather information for the article, but it maintained no bureaus there. The newspaper did not solicit advertising in Louisiana and had only 19 subscribers in the state. It published a daily Internet edition, but it targeted readers in the Milwaukee area.[146]

The court found nothing in the *Journal Sentinel*'s behavior that resembled that of the *National Enquirer* in *Calder*. Unlike the story about actress Shirley Jones in *Calder*, the *Journal Sentinel* article only "gave an overview of the policing efforts of the New Orleans police officers and was not directed in substantial part to the actions of Officer Schnapp."[147] The story was about police efforts to rid New Orleans streets of homeless and other dysfunctional persons. The story was published on the Internet, but nothing in the newspaper's actions suggested it was targeted at Louisiana readers.[148] The court did do a *Zippo* sliding scale analysis and noted that "except for online advertising in the Milwaukee area, there is no indication that the website was used for anything other than the posting of

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[133] *Blumenthal* at 46-48.

[134] "Clinton Aide Settles With Matt Drudge," Washington Post, May 4, 2001.

[135] Blumenthal also sued American Online. The court concluded AOL was an Internet service provider and 47 U.S.C. 230 provided it with a safe harbor. *Blumenthal* at 52.

[136] Crane v. Carr, 814 F.2d 758, 762 (D.C.Cir. 1987).

[137] *Blumenthal* at 57.

[138] D.C. Code 13-423(a)(4).

[139] *Blumenthal* at 53.

[140] The court said the newsgathering exception recognized in district case law did not apply because Drudge "is not a reporter, a journalist or a newsgatherer. He is, as he himself admits, simply a purveyor of gossip." *Blumenthal* at 57 n18.

[141] Id at 56.

[142] Id at 57.

[143] *Schnapp* at 609.

[144] La. Rev. Stat. 13:3201.

[145] *Buckley* at 472.

[146] *Schnapp* at 610.

[147] Id at 611.

[148] Id.

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information."[149] So, said the court, the website was passive and "is not alone sufficient for conferring jurisdiction."[150]

In rejecting *in personam* jurisdiction in *Schnapp*, the court found persuasive the decision of the United States Court of Appeals for the Fifth Circuit in *Buckley v. New York Times*. In *Buckley* the *Times* reported that a prominent public figure had been threatened with excommunication by the archbishop of New Orleans for his public support of racial segregation. The newspaper circulated 391 copies daily and 1,784 copies on Sunday in Louisiana, derived minimal advertising from the state, and only occasionally sent reporters into the state.[151] The excommunication story was an Associated Press dispatch and not one written by a *Times* journalist.[152] The court said that minimal circulation was not legally doing business in a state and "sporadic news gathering by reporters on special assignment and the solicitation of a small amount of advertising do not constitute doing business."[153] To allow personal jurisdiction based on such sparse contacts, the court concluded, would violate constitutional due process.[154]

Blumenthal and *Schnapp* represent a continuum. At the *Schnapp* end is an out-of-state newspaper with no commercial contacts and only rare journalistic contacts with a state. Publication of an Internet edition of the *Journal Sentinel* makes its content easily available to a global audience, but its unlikely that many people outside the Milwaukee area would access it. The story did not spotlight Schnapp. Rather it was about how police carried out a policy to clear homeless persons and others off city streets. Without any advertising of the Internet edition's content, people distant from Milwaukee would have no reason to access the edition. By contrast Matt Drudge's column contained a heavy diet of Washington gossip. It had a significant audience in Washington. It focused on Blumenthal and the political implications of his alleged wife-beating. Moreover, unlike the *Journal Sentinel*, *The Drudge Report* clearly is a national publication even if it appears only on the Internet. It also is significant that Drudge had some non-Internet contacts with Washington.

Griffis v. Luban[155] has significance to the decisions of federal appeals courts in *Young v. New Haven Advocate* and *Revell v. Lidov*. *Griffis* resulted from a spat between two Egyptologists conducted on sci.archaeology, an Internet newsgroup for archaeologists. Katherine Griffis is a self-employed consultant who teaches noncredit courses in ancient Egyptian history and culture at the University of Alabama at Birmingham. Marianne Luban is a Minnesota resident with an interest in ancient Egypt. Their newsgroup postings degenerated into attacks by Luban on Griffis' professional credentials, including one stating Griffis received her college degree from a "box of Cracker Jacks."[156] Griffis sued for libel and obtained a $25,000 default judgment in an Alabama court. When Griffis sought execution of judgment in a Minnesota court, Luban claimed that the Alabama court lacked personal jurisdiction over her. Holding that full faith and credit law compelled them to enforce the Alabama judgment, lower courts in Minnesota ruled for Griffis.[157] The Minnesota Supreme Court, reversing the lower courts, held that Alabama lacked jurisdiction over Laban and the judgment could not be enforced because to do so would violate constitutional due process.[158]

The Minnesota high court relied on its interpretation of *Calder* in ruling for Laban. To prevail under *Calder* and prove jurisdiction in Alabama, the court said, Griffis had to show: (1) Laban defamed Griffis, (2) Griffis felt the brunt of the harm from the defamation in Alabama, and (3) Laban expressly aimed the defamation at Alabama in such a way that Alabama was the focal point of the defamation.[159] Because the harm occurred to Griffis in Alabama, the third factor was the deciding one. Griffis was required to cite libelous statements that specifically pointed to her activities in Alabama.[160] The court said she did not do so. Nothing in the record indicated that anyone in the Alabama academic community read the postings. As for Griffis' consulting business, the court said it was nationwide in scope, and therefor any comments affecting it were not targeted at Alabama.[161] In ruling for Laban, the court concluded: "(E)ven if Luban knew or should have known her defamatory statements about Griffis would affect her in her home state of Alabama, that alone is not enough to demonstrate that Alabama was the focal point of Laban's tortious conduct."[162]

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[149] Id.

[150] Id at 611-612. The court suggested that a website considered passive in one jurisdiction might not fall into that category in another jurisdiction.

[151] *Buckley* at 473-474.

[152] Id at 471.

[153] Id at 474.

[154] Id at 475. Accord: *Connor* (applying due process to Alabama long-arm reach)

[155] 646 N.W.2d 527 (Minn. 2000).

[156] Id at 530.

[157] Griffis v. Laban, 633 N.W.2d 548 (Minn. App. 2001).

[158] 646 N.W.2d at 536.

[159] Id at 534, relying on *Imo Industries*,155 F.3d 254, 265-266 (3d Cir. 1998).

[160] Id.

[161] Id at 536.

[162] Id at 536-537.

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Young v. New Haven Advocate

When Warden Stanley Young sued for libel over the story and columns about Virginia's treatment of prison inmates from Connecticut, the two Connecticut newspapers and their journalists argued that the federal district court in Virginia lacked *in personam* jurisdiction.[163] The argument was based on the paucity of contacts with Virginia. They noted that none of the sourcing, writing or editing of the articles occurred in Virginia and the articles were published and posted on the Internet for Connecticut audiences. Moreover, neither the newspapers nor the journalists maintained an office or bank account or solicited business in Virginia. The only contacts with the state were telephone calls to some sources.[164] The court's decision to assert jurisdiction turned on both its interpretation of Virginia's long-arm statute[165] and its finding that constitutional due process would not be violated.[166] The long-arm statute permits Virginia to take personal jurisdiction if an out-of-state person causes "tortious injury by an act or omission in this Commonwealth"[167] or causes "tortious injury in this Commonwealth by an act or omission outside this Commonwealth" if the person maintains sufficient contacts with the state.[168]

Curiously, and contrary to most other case law, Federal District Court Judge Glen M. Williams ruled that the newspapers and journalists "conducted an act or omission within Virginia sufficient for this court to confer jurisdiction over them."[169] Where statutory personal jurisdiction is found over out-of-state persons in defamation cases, most case law relies on the harm occurring within a state and the contacts the persons have with a state.[170] The judge based his decision on *Telco Communications Group v. Apple a Day, Inc.*[171] In that case Telco sued Apple for libel for three press releases that Apple distributed and for comments it made to a Maryland securities analyst. The press releases were distributed through Business Wire, a wire service that posted them on the Internet and made them available through Internet service providers such as American Online and to financial wires.[172] The *Telco* court ruled the injury happened in Virginia because libel "occurs wherever the offensive material is circulated or distributed."[173] For the act to be legally committed in Virginia, the court said, more than *locus* of harm is required. The court said the use of Virginia service providers and the flow of information through Virginia financial institutions to consumers provided the necessary additional contacts to confer personal jurisdiction.[174]

Telco is stretching long-arm reach, but the district court in *Young* ignored a key element of that case. Apple distributed its press releases through Virginia Internet providers and financial intermediaries. The *Courant* and *New Haven Advocate* did no more than post stories on their websites. The papers' only contact with Virginia was telephone calls to sources. The District of Columbia long-arm statute was modeled after that of Virginia.[175] In *Margoles* the United States Courts of Appeals for the District of Columbia Circuit ruled that telephone sourcing by itself is not a sufficient contact to confer long-arm jurisdiction.[176] Telephone sourcing is less of a contact than sending a reporter into a state to gather news. Courts such as that of *Schnapp* have ruled that occasional on-site newsgathering is not sufficient to trigger jurisdiction.

The Fourth Circuit Court of Appeals ignored the district court's analysis and reliance on *Telco* in reversing the *Young* decision. Rather, the appeals court said its decision in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*[177] "supplies the standard for determining a court's authority to exercise personal jurisdiction over an out-of-state person who places information on the Internet."[178] In *ALS Scan* a Maryland company sued a Georgia Internet service provider and the operator of websites the provider provided for allegedly infringing on ALS's copyright of photos of female models by allowing them to be published on websites. The provider and operator conducted no business in Maryland. Their only contacts with Maryland residents occurred when that state's residents chose to pay a fee online and access the sites on which the photos appeared.[179] As defined by the court, the legal issue was "whether a person electronically transmitting or enabling the transmission of information via the Internet to Maryland,

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[163] 184 F.Supp.2d 498, 500.
[164] Id at 502.
[165] Id at 508.
[166] Id at 510-511.
[167] Va. Code Ann. 801-328.1(A)(3).
[168] Va. Code Ann. 801-328.1(A)(4).
[169] 184 F.Supp.2d 498, 508.
[170] E.g., *Blumenthal*.
[171] 977 F.Supp. 404 (E.D.Va. 1997).

[172] Id at 407.
[173] Id at 408, citing *Keeton* at 777.
[174] Id.
[175] *Margoles* at 1215; *Moncrief* at 220.
[176] *Margoles* at 1213.
[177] 293 F.3d 707 (4th Cir. 2002).
[178] 315 F.3d 256, 258.
[179] *ALS* at 709-710.

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causing injury there, subjects the person to the jurisdiction of a court in Maryland."[180]

The *ALS Scan* court said (a)pplying the traditional due process principles governing a State's jurisdiction over persons outside the State based on Internet activity requires some adaptation of those principles because the Internet is omnipresent."[181] Then the court adopted the *Zippo* model.[182] It did so with reluctance. It suggested the billions of interstate connections and millions of interstate transactions over the Internet dictated a stream-of-commerce test whereby "each person who puts an article into commerce is held to anticipate suit in any jurisdiction where the stream takes the article."[183] The court said it had to forego such a test until "concepts of personal jurisdiction are reconceived and rearticulated by the (United States) Supreme Court in light of advances in technology."[184] While the stream-of-commerce notion might be workable---but would engender a much greater long-arm reach by states---in commercial cases, it certainly would create huge difficulties for communications media in defamation cases.

By adopting the *Zippo* model, the court said, a state may exercise *in personam* jurisdiction when an out-of-state person (1) directs electronic activity into the state, (2) with the manifest intent of engaging in business or other interactions within the state, and (3) that activity creates a potential cause of action for a person within the state.[185] Generally, the court observed, a person who only places information on the Internet would not subject himself to an out-of-state tribunal's jurisdiction.[186] The court said the three-part test was consistent with *Calder*. The test would confer jurisdiction only if an out-of-state person used the Internet to direct activity at a state and if the activity caused an injury recognized as a cause of action by the state.[187] Applying the standard, the court found that Maryland could not exercise jurisdiction over the Georgia ISP and the operator of the website for mere posting of photos that allegedly infringed on the Maryland company's copyright.[188]

In *Young*, the appeals court noted that the prison warden did not rely on the few phone calls the *New Haven Advocate* and *Hartford Courant*

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[180] Id at 712.
[181] Id.
[182] Id at 713-714.
[183] Id at 713.
[184] Id.
[185] Id at 714.
[186] Id.
[187] Id.
[188] Id at 714-715.

reporters made into Virginia or the eight *Courant* subscribers in the state for assertion of Virginia jurisdiction.[189] Rather, Young asserted his claim that the newspapers' contacts with Virginia were sufficient to establish personal jurisdiction due solely to their Internet-connected activities.[190] Noting that the *ALS Scan* court had held its test was consistent with *Calder*, the court framed the issue as: Did the newspapers manifest an intent to "target and focus" their website articles, including content discussing conditions at Wallens Ridge State Prison, to a Virginia audience?[191] In answering the question, the court found:

> The overall content of both websites is decidedly local, and neither newspaper's website contains advertisements aimed at a Virginia audience. For example, the website that distributes the *Courant*, ctnow.com, provides access to local (Connecticut) weather and traffic information and links to websites for the University of Connecticut and Connecticut state government. The *Advocate*'s website features stories focusing on New Haven, such as one entitled "The Best of New Haven." In sum, it appears that these newspapers maintain their websites to serve local readers in Connecticut, to expand the reach of their papers within their local markets, and to provide their local markets with a place for classified ads. The websites are not designed to attract or serve a Virginia audience.[192]

Examining the articles that Young claimed had defamed him, the court said they discussed allegedly harsh conditions at Wallens Ridge and one mentioned that Young had Confederate war memorabilia in his office. However, the court concluded, the focus was "the Connecticut prisoner transfer policy and its impact on the transferred prisoners and their families back home in Connecticut. The articles reported on and encouraged a debate in Connecticut about whether the transfer policy was sound or practical for that state and its citizens. "[193] Given the focus on a Connecticut audience and the lack of any targeting of Virginia, the court said the newspapers could not have reasonably anticipated being sued in Virginia. The court ruled the lack

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[189] 315 F.3d 256, 261.
[190] Id at 262.
[191] Id at 263.
[192] Id at 263.
[193] Id.

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of sufficient Internet contacts barred Virginia from haling the newspapers into its courts.[194]

Revell v. Lidov

The federal district court in *Revell v. Lidov*, much as the appeals court did in *ALS Scan*, relied on a *Zippo* sliding scale analysis.[195] Hart G. Lidov's posting about Oliver "Buck" Revell's alleged knowledge that Pan Am Flight 103 would be blown from the skies "fits perfectly into the passive website extreme of the *Zippo* sliding scale," the court said.[196] The court rejected an argument by Revell that the *Columbia Journalism Review* bulletin board was interactive. While participants could post information on the website, the court said, it "is not truly interactive in that the site does not send anything back---there is no direct contact between the website, the people who send the information, or the people who read it."[197] The court made a critical distinction between the bulletin board and other parts of the *CJR* website where consumers could order goods and services and thus were interactive.[198]

The court stated that neither *Calder* nor *Keeton* applied to the case. Revell failed to show that Lidov was aware of his Texas residency or that his statements were aimed at any of Revell's activities in Texas.[199] Moreover, he failed to show that *CJR*'s bulletin board had tried to build a Texas audience.[200] Rather, the court pointed out, Lidov criticized Revell in his role "as the one person in the United States who was responsible for all criminal investigative, counter-terrorism, and counter-intelligence programs of the FBI . . .The article had nothing to do with the Plaintiff's position as a resident, community member, or community leader in the State of Texas."[201] The court noted that Revell had an international reputation as exemplified by appearances before Congress and on television news shows such as Nightline, 60 Minutes and Face the Nation.[202] In fact, despite the court's claim to the contrary, it did apply a *Calder* analysis. The court found that

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[194] Id at 264.
[195] 2001 U.S. Dist. LEXIS 3133 at *11, citing Mink v. AAAA Development, LLC, 190 F.3d 333 (5th Cir. 1999).
[196] Id at *14.
[197] Id.
[198] Id at *14-15.
[199] Id at *20-21.
[200] Id at *21.
[201] Id at *22.
[202] Id at *23.

taking jurisdiction would offend traditional notions of fair play and thus violate constitutional due process.[203]

In affirming the lower court's refusal to take jurisdiction, the Fifth Circuit Court of Appeals rejected a *Zippo* sliding scale assessment[204] and engaged in a more sophisticated *Calder* analysis. In concluding the *CJR* website was not *Zippo*-passive, the court described it as:

> (I)n this case, any user of the internet can post material to the bulletin board. This means that individuals *send* information to be posted, and *receive* information that others have posted. In . . *Zippo* a visitor was limited to expressing an interest in a commercial product. Here the visitor may participate in an open forum hosted by the website. Columbia's bulletin board is thus interactive, and we must evaluate the extent of this interactivity . . with respect to *Calder*.[205]

The court distinguished the facts in *Calder*, where the *National Enquirer* targeted the California activities of actress Shirley Jones, from those in *Revell*:

> We find several distinctions between this case and *Calder*---insurmountable hurdles to the exercise of personal jurisdiction by Texas courts. First, the article written by Lidov about Revell contains no reference to Texas, nor does it refer to the Texas activities of Revell's as distinguished from readers in other states. Texas was not the focal point of the article or the harm suffered, unlike *Calder*, in which the article contained descriptions of the California activities of the plaintiff, drew upon California sources, and found its largest audience in California.[206]

The appeals court cited *Reynolds v. International Amateur Athletic Federation*[207] as persuasive authority. In *Reynolds*, Harry "Butch" Reynolds, an international track star and Ohio resident, sued the London-based IAAF for libel over a press release announcing that Reynolds was barred from international track meets, including the Barcelona Olympics, for two years for failing a drug test. The drug test had been conducted in Monte Carlo and its results analyzed in Paris.[208] A federal district court found it had personal jurisdiction and awarded $27.4 million to Reynolds in a default judgment.[209] The Sixth Circuit Court of Appeals reversed. The court said Reynolds claim had to arise from IAAF activities in Ohio for Ohio courts to take jurisdiction. Instead the "controversial urine sample was taken in Monaco, analyzed in France, and confirmed by an arbitration hearing in England."[210] To permit specific *in personam* jurisdiction in Ohio, the court concluded, would offend traditional notions of fair play and substantial justice and thus violate constitutional due process.[211]

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[203] Id.
[204] As to whether personal jurisdiction could be found on a *Zippo*-passive website, the court reserved "this difficult question for another time." 317 F.3d 467 at *11 n30.
[205] Id at *12-13 (footnote omitted).
[206] Id at *15-16.
[207] 23 F.3d 1110 (6th Cir. 1994).

The *Revell* court also cited *Young v. New Haven Advocate* with approval.[212] It said *Young* stood for the legal principle that under *Calder* Virginia could not take jurisdiction unless the Internet editions of out-of-state newspapers manifested an intent to target and focus on Virginia readers. Merely making their editions accessible on the Internet was not sufficient.[213]

The court stated of *CJR* and Lidov:

> (T)he post to the bulletin board here was presumably directed at the entire world, or perhaps just concerned U.S. citizens. But certainly it was not directed specifically at Texas, which has no especial relationship to the Pan Am 103 incident. Furthermore, here there is nothing to compare to the targeting of California readers represented by approximately 600,000 copies of the *Enquirer* the *Calder* defendants knew would be distributed in California, the *Enquirer*'s largest market.[214]

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[208] Id at 1112.
[209] Id at 1114.
[210] Id at 1117.
[211] Id at 1121.
[212] 317 F. 3d 467 at *20-21.
[213] Id.
[214] Id at *21-22.

The court said one suing for defamation cannot demonstrate purposeful availment to meet constitutional due process by showing publication to "some forum somewhere."[215] The publisher of an alleged libel must know or should have known that he reasonably could be haled into court in a particular forum. The court said:

> Lidov must have known that the harm of the article would hit home wherever Revell resided. But that is the case with virtually any defamation. A more direct aim is required than we have here. In short, this was not about Texas. If the article had a geographic focus, it was Washington, D.C.[216]

Under the circumstances of the case, the court concluded, constitutional due process bars Texas courts from taking jurisdiction.[217]

Conclusions

The law on personal jurisdiction on defamation lawsuits over Internet publication is rapidly evolving. Within three months a federal district court in Virginia refused to take personal jurisdiction in a libel action by the Rev. Jerry Falwell, a Virginia resident, against Gary Cohn, an Illinois resident who maintains a website under the domain names jerryfalwell.com and jerryfallwell.com. [218]The domain names are held by entities domiciled in Washington and Maryland. Content of the website is stored on a server in Virginia. The court said the website's content addresses a national audience and did not target Virginia. Moreover, Rev. Falwell is self-admittedly a national figure. Under *Young*, the court said, it was barred from taking jurisdiction.[219]

Young and *Revell* are the most significant decisions to date on the Internet editions of publications. While the outcomes are similar and are victories for the press, the circumstances are different. *Young* involved the Internet editions of a Connecticut metropolitan daily newspaper and a Connecticut weekly alternative newspaper. The newspapers published articles about events in Virginia that primarily were written for Connecticut audiences. The daily newspaper had eight subscribers in Virginia. The

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[215] Id at *22.
[216] Id at *23.
[217] Id at *24-25.
[218] Jerry L. Falwell v. Gary Cohn and God.Info, Civil No. 6:02CV00040 (W.D.Va. March 4, 2003).
[219] Id at 5.

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alternative weekly had none. By contrast, in *Revell*, the publication was the interactive Internet discussion group of a national trade magazine. In both cases, however, the content on the Internet was available to the world. Arguably, the availability could have led the courts[220] to interpret *Keeton* as conferring general jurisdiction over *CJR* and *Calder* as mandating specific *in personam* jurisdiction over Lidov. In both cases the Supreme Court looked at the substantial audiences reached. The difference is that the readers in *Keeton* and *Calder* were sought after by the publications.[221] In *Young* and *Revell* the audiences were only potential.

Use by courts of *Zippo* sliding scale analysis only muddies legal analysis. It is the audiences that publishers or journalists target that count. This is the essence of *Calder*. In all but a few circumstances this should protect local and regional publications from being haled into court in distant locales due to mention in stories of persons who reside outside their circulation areas or intended Internet audiences. For national publications the emphasis on targeting provides a measuring stick for editors to judge where they may be vulnerable to being forced to defend their editorial content in court. At the same time the current state of the law is likely to be troubling to editors. Examining where the foci of stories are inevitably involves second-guessing by judges of editorial decisions.

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[220] The losing parties so urged the courts.

[221] Of course, in *Calder*, it was jurisdiction over the reporter and editor that was at issue. However, as the Court noted, the journalists were aware of the huge circulation of the *National Enquirer* in California.

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A Framework for Electronic Access to Court Records in Florida

A.E.J.M.C. 2003 Convention

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ABSTRACT

As federal, and state Courts formulate policies on which court documents should be placed on their websites, a Florida Committee, relying on the experiences of other states, formulated guiding principles for its policy on access to court records in February 2003. This paper examines the effectiveness of the Florida Recommendations and the extent to which Florida built on the State-wide Guidelines and Maryland's experience to formulate a comprehensive policy.

Introduction

Wouldn't you want to have information on your elected official's convictions for wife beating or your prospective babysitter's for child molestation available to you right in your living room? On the other hand, how would you like your speeding conviction to be available online for your neighbors and friends to see?

In recent years with advancements in technology, legislatures and court administrators are hotly debating these issues across the United States. Various state courts have been implementing new websites to facilitate online public access to court records. The rationale behind online access is to reduce the work of state employees who are otherwise bombarded with requests for information. However, when it comes to records dealing with criminal law or children's issues, privacy interest groups have raised concerns that the release of records to individuals on a case-by-case basis is significantly different from the release of records to anonymous web-browsers.

In this setting various courts and legislatures across the United States have taken steps toward defining policies for regulating electronic access to court records.[1] The policies have varied between the position in California's Report that differentiates between the treatment of paper and electronic access, restricting access to the latter,[2] to

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[1] Arizona, California, Colorado, New York, North Carolina, Ohio, Utah, Vermont, Virginia and Washington have actually drafted or approved or are in the process of formulating rules to apply to access to court records. *See* PRIVACY & ELECTRONIC ACCESS TO COURT RECORDS REPORT & RECOMMENDATIONS JUDICIAL MANAGEMENT COUNCIL, Recommendation 2 at 29. *Available at* http://www.flcourts.org/pubinfo/documents/privacy.pdf.

[2] *See* JUDICIAL COUNCIL OF CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS' COURT TECHNOLOGY ADVISORY COMMITTEE REPORT ON PUBLIC ACCESS TO ELECTRONIC TRIAL COURT RECORDS. *Available at* http://www.courtroom21.com/privacyconf/Reference/california-finalrulepackage-12.01.pdf. *Last visited* on 03/29/03. Recommendation 2 provides that electronic access be given to registers of actions, calendars and other records in civil cases, both remotely and at the courthouse. However the Committee recommends that family law, juvenile, guardianship and conservatorship, mental health, criminal and civil harassment cases be made available electronically only at the courthouse. This position is consistent with Cal. Rules of Court Rule 2073. *Id.* at 6.

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the position in Washington that treats electronic access to court records in the same manner in which it treats paper access[3] except in the case of family law records.[4]

Until 2002, the contention was that the rules closest to being a comprehensive policy on how electronic records should be handled by the state[5] were those proposed in Vermont.[6]

In 2001, federal guidelines were issued directing which court documents could be placed on the Web sites accessible to the public and which required greater privacy.[7] Under the Federal Court's guidelines the presumption of a right to access was imposed for civil case files[8] that did not recognize the distinction between paper and online court records and made the entire public file available electronically.[9] However, the system imposed a level of access by which certain documents might be restricted based on the "identity of the individual" or "the nature of the document being sought or both."[10]

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[3] *See* PRIVACY & ELECTRONIC ACCESS TO COURT RECORDS, *supra,* at 29. *See also* GENERAL RULES OF APPLICATION JUDICIAL INFORMATION SYSTEM COMMITTEE RULES FOR WASHINGTON, Rule 15. *Available at* http://www.courts.wa.gov/rules/display.cfm?group=ga&set=jiscr&ruleid=gajiscr15. *Last visited* on 03/29/2003. The rule proclaims that the policy of the court is to make records accessible except where it would be an "unreasonable invasion of privacy" or be burdensome on the court. *Id.*

[4] *See* RULES OF GENERAL APPLICATION GENERAL RULES, General Rule 22. *Available at* http://www.courts.wa.gov/rules/display.cfm?group=ga&set=GR&ruleid=gagr22. *Last visited* on 03/29/2003.

[5] *See* PRIVACY & ELECTRONIC ACCESS TO COURT RECORDS REPORT AND RECOMMENDATIONS, *supra,* at 29 for the perspective that Vermont made the most progress in anticipating the "eventual elimination of paper records altogether" and in creating a comprehensive access policy contemplating online access as the only means of access.

[6] *See* COMMITTEE TO STUDY PUBLIC ACCESS TO COURT DOCUMENTS AND ELECTRONIC COURT INFORMATION REPORT at 4. *Available at* http://www.vermontjudiciary.com/Resources/ComReports/pafinalrpt.htm. *Last visited on* 03/12/2003. The Committee suggests no distinction should be made between access to electronic and paper court records because "most forms of court records will not exist in paper form in the relatively near future and access to electronic forms will be the norm." *Id.*

[7] *See* REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES, JUDICIAL CONFERENCE COMMITTEE IN COURT ADMINISTRATION & CASE MANAGEMENT, AGENDA F-7 (Appendix A) Court Admin./Case Mgmt. September 2001 June 26, 2001. *Available at* http://www.uscourts.gov/press-Releases/att81501.pdf. *Last visited* on 03/29/2003.

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[9] *Id.*

[10] *Id.*

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However, the Committee recommended that criminal files not be made accessible electronically.[11] The rationale behind this was that criminal files did not present storage problems, and persons who really needed them could still access them at the courthouse. The Committee was also concerned about the safety and security problems that outweighed, for them, the legitimate need for access to these records. The Committee cited the possibility of defendants and their families being intimidated by co-defendants with easy access to co-operation information as well as the fact that access to warrants and indictments might "hamper law enforcement and prosecution efforts."[12] The Committee, however, recommended some limited electronic access to these records.[13]

In March, 2001, Maryland's Court of Appeals Chief Judge, Robert Bell appointed a committee to study and make recommendations on how the Maryland court system should proceed in implementing policies to handle the dissemination of court records in light of new electronic technology. Subsequently, a government-funded committee was formed to draft a model policy for states to use in determining which court records should be released online. This document, completed on October 18, 2002,[14] appears to benefit from and improve upon some of the Recommendations of the Maryland Committee[15] completed in May of the same year.

The nation-wide project, which began in January 2001, was funded by the State Justice Institute and staffed by the National Center for State Courts and the Justice

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[12] *Id.*

[13] *Id* at 2.

[14] Martha Wade Steketee and Alan Carlson, DEVELOPING CCJ/COSCA GUIDELINES FOR PUBLIC ACCESS TO COURT RECORDS: A NATIONAL PROJECT TO ASSIST STATE COURTS (State Justice Institute, National Center for State Courts and the Justice Management Institute, 2002.) *Available at* http://www.courtaccess.org/modelpolicy.

Management Institute.[16] After receiving more than 130 comments from citizens, lawyers, media and privacy interest groups on a first draft of the policy,[17] the *Guidelines* for states in determining the issues they should address in implementing state policy on electronic access to court records were finalized and endorsed by the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) in August 2002.[18] They became effective on October 18, 2002.

This paper compares the report prepared in Maryland and the *Guidelines* prepared for state courts with the 2003 guidelines established by a committee appointed by the Florida Legislature.[19] Part 1 will examine the arguments advanced for and against electronic access. Part 2 will review the case law in the area of access to court records. Part 3 will look at the Maryland and Model policy and Part 4 will examine the recommendations made by the Florida Committee.

PART I: The Arguments...

A study on *Public Attitudes Toward Uses of Criminal History Information*[20] conducted by noted privacy researcher Dr. Alan Westin on behalf of SEARCH in July 2001 reveals that 37 percent of Americans prefer access to criminal records to be limited

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[15] REPORT OF THE COMMITTEE ON ACCESS TO COURT RECORDS. *Available at* http://www.courts.state.md.us/access.

[16] *Id. Project Process* at vi. After 10 months of drafting, public debate and deliberation a set of Guidelines have been identified to assist state courts in determining the path which they will take in providing electronic access to court records.

[17] The comments are available on the Model Policy Website. *Available at* http://www.courtaccess.org/modelpolicy.

[18] *Guidelines, supra* at iv.

[19] STUDY COMMITTEE ON PUBLIC RECORDS: EXAMINATION OF THE EFFECTS OF ADVANCED TECHNOLOGIES ON PRIVACY AND PUBLIC ACCESS TO COURT RECORDS AND OFFICIAL RECORDS FINAL REPORT, February 15, 2003.

[20] *Public Attitudes Toward Uses of Criminal History Information: A Privacy, Technology, and Criminal Justice Information Report,* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, July 2001. *Available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pauchi.pdf. Last visited on 1/21/2003.

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only to selected users, while 47 percent prefer a "partially open" system where only records of convictions would be made available to the public.[21] Only 12 percent favored a "completely open system" where both conviction and arrest records are freely available to the public.[22]

By contrast, 90 percent of Adult Americans would prefer State agencies not use the Internet "to post criminal history information" already a matter of public record.[23]

These figures highlight the increasing importance of privacy issues in the age of the Internet. The issue of whether and which court records should be placed online for the public to access is a controversial one. The camps are divided into two. The first group advocates greater privacy for reasons ranging from the right to privacy to fear of identity theft. The second group favors greater access to court records since limiting such access could lead to a totalitarian society. While most agree that there should be some amount of documentation of court proceedings and information on the Internet, there is no consensus on the degree of such access.

Westin's research indicates that Americans' concern with their privacy has increased from approximately 34 percent of Americans being at least "somewhat" or "very" concerned with their personal privacy to a 1999 study which revealed that 94 percent of Americans were concerned with privacy threats.[24] The same article indicates that a 1999 study carried out by IBM revealed that 77 percent of Americans were "very concerned" about the misuse of their personal information and threats to privacy.[25]

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[21] *Id.* at 5
[22] *Id.*
[23] *id.*
[24] *Id.* at 7
[25] *Id.*

Westin says that, while in the post-Watergate period the major threat in the perception of Americans came from the government, in the mid- 1990s big business was equally threatening to the public.[26]

Beth Givens, director of Privacy Rights Clearinghouse, while generally advocating greater online access to public documents, is concerned about access to divorce and health proceeding records as she says, "a growing number of individuals are disenfranchised for life and from the full mainstream of society by the businesses who mine court records and other proceedings. They will not be able to get decent jobs with their main skills because of information obtained by background checkers. Employees don't want to take a chance on people stigmatised by divorce."[27] Thus Givens suggests a two-tier system wherein court records are made available on paper but screened before being put online.[28] As Givens says, "given the sensitive nature of these records, you don't want your neighbors typing your name into Google [a search engine] and getting details of a failed marriage."[29]

Rebecca Daugherty, director of the Freedom of Information Center at the Reporter's Committee for Freedom of the Press, on the other hand, says that divorce is a public proceeding under the law and should be open to the public. "These are political institutions and the study of them is sometimes legitimate," she said. She cites the case of

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[26] *Id.* A survey by Freedom Forum's First Amendment Center reported "solid backing for public access to criminal conviction records and public records" but found "weak" support for making records available on the Internet. Anders Gyllenhall, executive editor of the News and Observer of Raleigh, North Carolina said, "...people mistrust both the government and private industry to use records appropriately." *Id.*

[27] Drew Clarke, "Privacy Panellists Debate where to Draw E-line on Public Records," *National Journal's Technology Daily*, April 19, 2002.

[28] *Id.*

[29] *Id.*

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a Securities Exchange Commissioner who dangled his wife over the staircase by the neck.[30]

Carrie Gardner, ex chairwoman of the American Library Association Intellectual Freedom Committee's Privacy Sub-committee, was concerned about the effects of limited access and that it could lead to a totalitarian system.[31]

Judge Rudolph Kass, head of an Advisory Panel to the Supreme Court of Massachusetts on online access to court records, is opposed to wide-scale online access to records. Kass says, "if you want to be nosy maybe you should work for it, ... there's a palpable difference between courts being open and being in the publishing business. Do we have to run an electronic bulletin board?"[32]

Not surprisingly, the Advisory panel recommended in 2001 that "for now only information from dockets showing the basic status of cases should be posted on the internet."[33]

New Jersey, on the other hand, was one of the few states to put virtually everything online.[34]

PART II: The Case Law...

The Case for Restricting Access to Court proceedings or the Fair Trial Debate...

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[30] *Id.*

[31] *Id.*

[32] Ted Guest, *supra.*

[33] *Id.*

[34] *Id.* In 1996 The Supreme Court of New Jersey's REPORT OF THE PUBLIC ACCESS SUBCOMMITTEE OF THE JUDICIARY INFORMATION SYSTEMS POLICY COMMITTEE RECOMMENDATION 5 said "...privacy interests should neither preclude nor limit the public's right to access non-confidential information in electronic form." The Comment rejected the "notion that it is the role of the courts to restrict or suppress access to otherwise public information, gathered and maintained at the public expense, based on the possibility that it might be used to the prejudice of individuals in certain cases." *See* Susan Larson, *Public Access to Electronic Court Records and Competing Privacy Interests,* Judgelink at1. *Available at* http://www.judgelink.org/Insights/2001/E-Records . *Last visited* on 03/29/2003.

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The debate over restricting access to judicial proceedings during trials has its basis in American jurisprudence in *habeas corpus* and the fear that pre-trial publicity will lead to a denial of justice. Thus the First Amendment guarantee of freedom of speech[35] is in conflict with the Sixth Amendment guarantee of a fair trial.[36]

In *Richmond Newspapers v. Virginia,*[37] in reversing an order excluding the press and public from a murder trial, the United States Supreme Court held that the First and Fourteenth[38] amendments to the U.S. Constitution guaranteed the public a constitutional right to attend public trials. The Court also found that, while the Sixth Amendment guaranteed the accused a right to a public trial, it did not give him a right to a private trial. In *Richmond,* the Court, having found that the district judge did not make inquiries into whether alternate solutions could have been used to ensure fairness, the judgment was reversed. As the Court said "[a]bsent an overriding interest articulated in findings, the trial court of a criminal case must be open to the public."[39]

In *Globe Newspaper Co. v. Superior Court for the County of Norfolk,*[40]following the principles laid out in *Richmond,* the Supreme Court found unconstitutional a statute mandating that under all circumstances the press and public be excluded from the court

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[35] Amendment I of the Constitution was passed in 1791 and is to the effect: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[36] Amendment VI of the Constitution also passed in 1791 states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

[37] 448 U.S. 555 (1980).

[38] Amendment XIV of the Constitution, passed in 1868, states in part: "…no state shall make any law which shall abridge the privileges or immunities of citizens of the United States."

[39] *Id* at 581. The Court did not explore the possibility of finding an alternative means to prevent the public accessing improper information. *Id.*

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during the testimony of minor victims in a sex offence trial. Two state interests in protecting the law had been identified. The first was to protect the minor victim from further trauma and embarrassment. The second state interest was to encourage minor victims to testify. The Supreme Court, while recognizing the first interest as compelling, held that this interest did not warrant "a mandatory closure rule." The issue of whether public access to such testimony should be denied ought to be determined on a case-by-case basis, taking into consideration the peculiar characteristics of the case- including the age and psychological maturity of the victim and the nature of the crime among other issues, the Court said.[41] In relation to the interest in encouraging minors to come forward and give evidence the court held there was no "empirical support" for the claim that automatic closure would lead to an increase in the number of minor sex victims coming forward.[42]

The Supreme Court decision in *Press Enterprise Co. v. Superior Court of California, Riverside County (Press Enterprise I)*[43] reinforced the theme of openness espoused by the court in *Richmond* and *Globe* and seemed to revise the *Gannet* position. In this case, the California Superior Court had closed much of the voir dire process from public scrutiny. Later, when *Press Enterprise* requested the transcripts from the voir dire, the judge, while admitting that some of the information was harmless, nonetheless prohibited the release of the transcript, since some of the information was sensitive.[44] The

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[40] 457 U.S. 596 (1982).
[41] *Id* at 607-608.
[42] *Id* at 609.
[43] 464 U.S. 501 (1984).
[44] *Id.* At 504.

California Court of Appeals denied a petition for a writ of mandamus to compel the Superior Court to release the transcript.[45]

The United States Supreme Court reversed the decision not to release the transcript. The Court asserted that there was a presumption of openness in juror deliberations in order to "vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected."[46] The Court held that this presumption could be rebutted only by an "overriding interest based on findings that closure (was) essential to preserve higher values" and that it was "narrowly tailored" to serve this interest.[47] However, the Court found that, on the facts in *Press Enterprise I,* there had been no finding by the lower court that open proceedings in jury selection would affect the fairness of the trial as contended by the Superior Court.[48] The Supreme Court also found that the lower court had failed to consider whether alternative measures could have been employed to protect the privacy interest of the jurors. The Court acknowledged that in the process of jury selection interrogation might touch on issues personal to individual jurors. However, in such circumstances, Burger preferred for the juror to initiate the application by presenting the problem in camera, thereby minimizing the risk of unnecessary closure and ensuring a valid basis for closure.[49] In such circumstances the Court held, however, transcripts of the closed proceedings should be made available at a reasonable time, if it could be done without infringing upon the juror's private information [50] and sealing this information where appropriate.[51]

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[45] *Id.*
[46] *Id* at 509.
[47] *Id* at510.
[48] *Id* at 510-511.
[49] *Id* at 512.

In *Press Enterprise Co. v. Superior Court of California for the County or Riverside (Press-Enterprise II)*[52] a nurse was charged with 12 counts of murdering patients by administering large dosages of a heart drug. The trial court granted the accused's motion to exclude the public from the preliminary hearing. After a 41-day preliminary hearing, the Magistrate refused to release the transcripts to Press-Enterprise. The California Supreme Court denied the writ of mandamus application by Press-Enterprise, holding there was no general first amendment right of access to preliminary hearings. The Court also held that where the Defendant established a "reasonable likelihood of substantial prejudice"[53] this would warrant closure.

On certiorari to the United States Supreme Court, the decision was reversed. The Court found that the process of selection of jurors was a public process with exemptions only for good cause shown.[54] However, the court noted that while open criminal proceedings gave an assurance of fair trial to the public and accused, there are limited circumstances where the right of the accused to a fair trial might be undermined by publicity.[55] The Court held that the right of access applied to preliminary hearings. Thus, in order to justify closure, the applicant had to show "specific on the record findings"

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[50] *Id* at 513.

[51] This position overturned the Court's previous decision in *Gannet Co. v. Pasquale*, 443 U.S. 368 (1978) where the Court held that the constitutional right to a public trial guaranteed by the sixth amendment was for the protection of the accused and there was no constitutional guarantee of public access to judicial proceedings. Thus, despite the societal interest in seeing that justice was swiftly and fairly administered, the Court found there was no constitutional right to attend a criminal trial. The Court also found that there was no right at common law recognized by the constitution for public access to pre-trial proceedings.

[52] 478 U.S. 1 (1986).

[53] *Id* at 6.

[54] *Id* at 8.

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demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."[56]

The cases examined thus far relate specifically to access to court proceedings at all stages. The position of the United States Supreme Court appears to be that citizens have a right of access to judicial proceedings that can only be rebutted in extreme cases. This right is grounded in the Sixth Amendment guarantee of a fair trial- that necessitates a public trial. The issue for purposes of this paper, however, is whether there is a public right of access to electronic court records.

In *Nixon v. Warner Communications*[57]the Supreme Court held that the constitutional right to a public trial did not mandate the release of tapes that were the subject of criminal proceedings to the press for distribution to the public.

In *Nixon,* during the trial of several of Richard Nixon's former advisors for conspiring to obstruct justice during the Watergate investigation, the ex-president had been required to produce some 22 hours of taped recordings of conversations in the White House and Executive Office Building. These tapes were played for the Jury as part of the evidence used in the case. Subsequently, Warner Communications requested copies of the tapes to "copy, broadcast and sell to the public the portions of the tapes played at the trial."[58] Nixon opposed the application on grounds that he had a proprietary interest in his voice that would, by dissemination to the public, be unfairly appropriated. He also argued

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[55] *Id* at 9.
[56] *Id* at 13-14.
[57] 435 U.S. 589 (1978).
[58] *Id* at 594.

release of the papers would infringe on his privacy and, through editing, be presented to the public in a distorted manner.[59]

On December 5, 1974 Judge Gessel in the Trial Court[60] though cautioning against "over-commercialization of the evidence," and copying the tapes before the trial was concluded;[61] held there was a common law privilege of public access to judicial records and Warner Communications was, thus, entitled to obtain the tapes.[62]

However, Judge Sirica, who presided at the trial, denied the petition for immediate access to the tapes without prejudice because, as he noted, the convicted men had filed motions of appeal and release of the tapes might prejudice the defendant's rights on appeal.[63]

The Court of Appeals reversed this decision,[64] determining that the mere possibility of prejudice to the defendant's rights in the event of retrial did not outweigh the public's right to access.[65]

The United States Supreme Court[66] confirmed that there was, in fact, a general right to copy and inspect judicial records and documents,[67] but also noted that this right was not absolute.[68] In the particular case the Court noted that an administrative process had been laid down by statute for implementing public access to such records.[69] The existence of this procedure, in the opinion of the court, tipped the scale "in favor of denying release."[70] The Court found the common law right of access to judicial records did not authorize release of the tapes.

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[59] *Id* at 601.
[60] *The United States v. Mitchell,* 386 F. Supp. 639 (1974).
[61] *Id* at 643.
[62] *Id* at 641.
[63] *United States v. Mitchell,* 397 F. Supp. 186 (1975).
[64] *United States v. Mitchell,* 179 U.S. App. D.C. 293 (1976).
[65] *Id* at 302-304.
[66] *Nixon v. Warner Communications,* 435 U.S. 589 (1978).
[67] *Id* at 597.
[68] *Id* at 598.
[69] *Id* at 603: under the Presidential Recordings Act U.S.C. 44: 2111 the Administration of General Services was to take custody of the tapes and documents, the documents wee to be screened by government

The Supreme Court also held that the Sixth Amendment guarantee of public trial did not confer a right for the public to access the tapes.[71] Justice Powell, delivering the Court's opinion, dismissed the contention of Warner Communications that by listening to the tapes and hearing the inflection and emphasis, the public would be better able to understand and evaluate the proceedings. Powell compared the tapes to testimony of a live witness and noted there was no constitutional right to have such testimony recorded and broadcast.[72]

The Court also decided that the guarantee of a public trial conferred no special benefit to the press and did not require that the trial be broadcast live.[73] The requirements of a public trial were, thus, satisfied where members of the public and press were given the opportunity to attend the trial and report what they observed. Thus, the Supreme Court reversed the Court of Appeal decision remanding the case with directions for an order denying the application for access to the tapes with prejudice.

Thus, it appears that there is lesser support for the principle of public access to court records than there is for access to the courtroom while a case is in session. After the trial is concluded, however, the issues at stake are different. No longer does the Sixth Amendment right to a fair trial come into play in arguments for access to old court

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archivists so that the private sections could be returned to Nixon, while those of historical value would be preserved for use in judicial proceedings and eventually made accessible to the public.

[70] *Id* at 606.

[71] *Id* at 610.

[72] *Id* at 610.

records. The right to a fair trial is not being threatened by media publicity. In these cases, instead the value at stake is a person's right to privacy.

The right to access court records, as is the case with other public records, is primarily guaranteed by the Freedom of Information Act,[74] The Supreme Court case which best approximates how the court balances the statutory public right of access to such records with the privacy rights of litigants is *United States Department of Justice v. Reporters Committee for Freedom of the Press.*[75]

In *Reporters Committee* the United States Supreme Court had to determine whether the compilation of otherwise hard to obtain information or rap sheets on criminals by the Federal Bureau of Investigation (FBI) was subject to disclosure under the FOIA.[76]

The Court balanced the privacy interest of the criminals against the public interest in the release of the rap sheet and held that the requester (CBS) was not entitled to access the rap sheet. Thus the Supreme Court reversed the Court of Appeals decision that an individual's privacy interest in criminal history information already a matter of public interest was minimal. The Court's decision was fundamentally based on its interpretation of the Freedom of Information Act and specifically sections 6 and 7(c), which exempted materials of a private nature.

In interpreting privacy the Supreme Court identified a distinction between the "scattered disclosure of bits of information" and the "revelations of the rap sheet as a

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[73] *Id* at 610.
[74] *See* Victoria S. Salzmann, *Are Public Records Really Public? The Collision between the Right to Privacy and the Release of Public Court Records Over the Internet,* 52 Baylor L. Rev. 355 at 357.
[75] 489 U.S. 749 (1989).
[76] *Id* at 764.

whole."[77] Justice Stevens, who gave the opinion of the court, relied on the definition of "private" found in Webster's dictionary, which was "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public."

The Court also noted that the FOIA specifically required the deletion of identifying details when information is made public which reflected a recognition by Congress of the need to protect the individual's privacy. The Court also took into account the Privacy Act.[78]

In interpreting the phrase "unwarranted invasion of privacy" in section 7(c) of the statute, the Court held that whether the invasion of privacy was warranted turned on the nature of the requested document and its relation to the "basic purpose of the FOIA to open agency action to the light of scrutiny."[79] The Court acknowledged that the purpose of the Act was not furthered by the disclosure of information about private citizens accumulated in various governmental files but which revealed little or nothing about the agency's own conduct."[80]

The case law has moved progressively towards the position where the public is generally entitled to access court proceedings and records. Many states have laws that actively promote electronic access to court records.[81] In some cases, though the laws may not provide for electronic access, the states have opted to put court records online.[82]

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[77] *Id.*
[78] *Id* at 767.
[79] *Id* at 771.
[80] *Id* at 775.

The Maryland Report and the Model Policy for States ...

Both the *Guidelines*[83] and the *Maryland Report*[84] identify as their premise the principles of a presumption that court records should be open;[85] that the same level of access should generally be allowed regardless of the format;[86] that sometimes it may be inappropriate to allow remote public access to documents available at the courthouse;[87] that some information should be precluded from public access;[88] and policies should be "clear, consistently applied and not subject to interpretation by individuals."[89]

Under the General Policy outlined in the *Maryland Report*, the Committee highlights the importance of not premising the decision to grant access to court records on the reason for which the information is requested.[90] The Maryland Committee also

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[81] For e.g. In Arizona the Superior Judge of the Supreme Court is mandated, as far as resources facilitate, to provide electronic access to court records (*see* Ariz. St. S. Ct. R. 123.4c (2002), In Arkansas the Clerk of Court is authorized to implement a system to allow the public electronic access to court decisions and rules (ARK. CODE ANN. § 21-6-401 (Michie 2002). Other states which have rules or laws specifically related to electronic access to records include California, Indiana, Minnesota, Mississippi, North Carolina, New Jersey, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas and Virginia.

[82] Alabama, Alaska, Colorado and Connecticut are among the states, which have put in place electronic court databases although no laws or court rules mandate that the public should have electronic access to information. *See* A Quiet Revolution in the Courts: Electronic Access to State Court Records: A CDT Survey of State Activity and Comments on Privacy, Cost, Equity and Accountability, (Center for Democracy& Technology, 2002). *Available at* http://www.cdt.org/publications/020821courtrecords.shtml. *Last visited* 09/22/2002.

[83] Steketee & Carlson, supra.

[84] MARYLAND REPORT, *supra*.

[85] Steketee, *supra*, at 1. *See also* MARYLAND REPORT, *supra*, at 6 which adopts as its general policy the position that the public should have access to court records "with appropriate exceptions" *(id.)*

[86] *Id. See also* MARYLAND REPORT, *supra*, at 6 that is to the same effect.

[87] *Id.*

[88] *Id.*

[89] *Id.*,

[90] MARYLAND REPORT, *supra*, § 1(c).

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recommends that the degree of access should be the same for criminal and civil cases, subject to applicable statutes and rules.[91]

The aim of the *Guidelines* is to raise the issues which individual states must take into account in formulating their rules for electronic access to information.[92] These issues range from what is considered to be a part of the record to procedures for sealing records.[93]

The Guidelines

The *Guidelines* are aimed[94] at maximizing access to court records, supporting the role of the judiciary, promoting governmental accountability, contributing to public safety, minimizing injury risk to individuals, protecting individual privacy rights and interests, protecting proprietary business information, minimizing the reluctance of individuals to bring actions before the court (because of the fear of thereby placing it in the public domain).[95] The *Guidelines* are also intended to ensure efficiency on the part of the court and clerk of court, good customer service, and to guard against undue burden on the function of the court.[96] In short, the *Guidelines* begin from the stated presumption of the right of the public[97] to access [98]information and balances this right against all the issues that come into play when considering placing court records online.

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[91] *Id* §1(b). This position was determined on a majority vote: 15 persons voting for the section and 3 persons against it *(id.)*
[92] GUIDELINES, *supra,* at 2
[93] *Id.*
[94] The Maryland Committee also recommends that these factors be considered in determining access. *See* MARYLAND REPORT, *supra,* at 5.
[95] *Id* § 1.00(a)(1)- (8).
[96] *Id* § 1.00(a)(9)- (10).
[97] Under the *Guidelines* the term "public" includes persons, businesses, non-profit entities, organizations and associations, governmental agencies with no policy governing their access to court records, media, and "entities which gather and disseminate information" for profit or otherwise; but not court or clerk of court employees, private or governmental "people or entities" who assist in providing court services, public

Both the *Guidelines*[99] and the *Maryland Report*[100] define court records as including "documents, information or other thing collected, received or maintained by a court or clerk of court in connection with a judicial proceeding.[101]

Court records include indexes, calendars, dockets, registers of action, official records of the proceedings, orders, decrees, judgments, minutes and "any information in a case management system created by or prepared by the court or clerk of court relating to judicial proceedings."[102] This list is not exhaustive. Notably also the court record is very broadly defined.[103] Significantly it includes three categories:

1. Documents filed or lodged with the court in proceedings or as part of the case file.[104] The documents in this category include exhibits offered during hearings and trials,[105] information before the court in making its decisions.[106]

2. "Information generated by the court."[107] This includes information from the Court Administrator and clerk of court;[108] proceedings before temporary

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agencies whose access to court records is determined by another statute, order or policy, litigants in a court case and their legal representatives in requesting documents related to their case. *Id* at § 2.00(a)- (h).

[97] *Id* at § 4.70(b). This request is required to be made by a written motion to the court (*see* § 4.70(c)) and if the prohibition was made pursuant to a request by another member of the public the court must advise this person of the request to access the information (*id.)*

[98] Under the *Guidelines* "public access" is the ability of the public to "inspect and obtain a copy of the information in a court record." *Id* at 3.20. *See also* MARYLAND RECOMMENDATIONS, *supra,* at § II(E). The definition is broad and not affected by the reason for the request. Access includes both inspecting a document and getting a copy of it and the form of the copy is not limited in the section. Also physical and monetary impairments should not disadvantage requestors. Similarly, the format of the electronic information should not discriminate against particular computer platforms and operating systems. *Id* at 17.

[99] *Id* § 3.00

[100] *Maryland Recommendations, supra,* at II. Definitions (A) 1.

[101] *Guidelines, supra,* at § 3.10(a)(1). *See also Maryland Recommendations, supra,* at II. Definitions (A)1(a).

[102] *Guidelines, supra,* at § 3.10(a)(2). *See also Maryland Recommendations, supra,* at II. Definitions (A)1(b): Note that in Maryland the phrase used is "court case" instead of "judicial proceedings." The *Guidelines* Committee deliberately opted to use the phrase "judicial proceedings" since it contemplated a larger base of actions (than court cases) falling within the parameters of court records (*see Guidelines, supra,* at 13.

[103] *Guidelines, supra* at 12 Commentary.

[104] *Id.*

[105] *Id* at 13.

[106] *Id.* This is so even where the court did not consider the information.

[107] *Id* at 12.

[108] *Id* at 13.

judges or referees; notices, minutes, orders and judgments as well as information collected to manage the court's cases.[109]

3. Information related to the operation of the court.[110] This deals with internal policies, "memoranda and correspondence, court budget and fiscal records"[111] as well as other data that makes the internal policy of the court more transparent.[112]

"Electronic form" is:[113]

a) "Electronic representations of text or graphic documents."[114]

b) Electronic images such as a video image of a "document exhibit or other thing."[115]

c) Data in the fields or files of an electronic database.[116]

d) Audio or video tape recordings in analog or digital form of an event or "notes in an electronic file from which the transcript of an event can be prepared." [117]

The terms of the *Guidelines* apply to all court records, notwithstanding their "physical form, method of recording or storage."[118]

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[109] *Id* at 14. The issue arises, however, of what constitutes court records and whether the clerk's notes or only the transcript from his notes are part of the official record, or whether an electronic version of the document, audio and video tapes are considered to be part of the court records. *Id* at 14.

[110] *Id* at 13.

[111] *Id* at 14.

[112] *Id* at 14. Information specifically not included in the term "court records" under the *Guidelines* is documents maintained by the clerk of court in a capacity other than clerk.[112] Additionally, information, which is gathered, maintained or stored by another governmental agency or other entity to which the court has access, does not form part of the court record.(*Id* at § 3.10(b)(1) & 3.00(b)(2). *See also* MARYLAND REPORT, at § II(a).) Where the issues become blurred the *Guidelines* indicate a need for individual states to determine whether material exchanged during discovery, or accumulated by the court in its capacity of managing detention facilities should form part of the record. Alternative Disputes Resolution (ADR) do not form a part of the court records since this information is not released to the court for purposes of determining a case. *See* GUIDELINES, *supra,* at 16.

[113] *Id.* § 3.40.

[114] *Id* at 20. This includes word-processed documents or those in PDF format, pictures, charts and spreadsheets. *Id.*

[115] *Id.* This includes documents produced by imaging but not by filming. The documents can also be produced by a video camera, part of an evidence presentation system for a courtroom (*Id.*)

[116] *Id* at 20. This section effectively places case management systems and data warehouses within the ambit of electronic records under the *Guidelines*. *Id.*

[117] *Id.* This includes computer-aided transcription systems (CAT). The section as worded, however, does not determine whether such information would be an official record. This is an issue for the individual court to determine. *Id* at 20.

The *Guidelines* impose a rule of general access to all information in the court record[119] consistent with the presumption of a right to access and the position that this access should not be premised on reasons for requesting information.[120] Where public access is prohibited, the requestor must be informed whether the information exists.[121] This provision is consistent with the goal of accountability.[122] The *Guidelines* also recommend that individual states should implement a process to communicate how much information is excluded if part or all of the information is precluded from public access.[123]

The writers of the *Guidelines* identify two problems with the provision. First, the danger that, in the effort to reveal the existence of information, the keeper may disclose the very information the court's order was aimed at protecting.[124] The suggested solution to this is to use generic descriptions, captions or pseudonyms.[125]

The second concern is that some of the current court electronic systems cannot facilitate releasing information on whether the documents requested exist without releasing the actual information protected under the court order and modification. In these cases protecting this restricted information, may be too costly.[126]

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[118] *Id* at 22. This section, by making access policy independent of technology and format, effectively promotes openness. *Id.*
[119] *Id at* § 4.10(a).
[120] *Id* at 23.
[121] *Id.* at Section 4.10(b).
[122] *Id.*
[123] *Id.* This provision promotes transparency.

[124] *Id* at 24.
[125] *Id.*
[126] *Id.* In states where convictions may be expunged or reduced from a felony to a misdemeanor on the paper record, a provision may be necessary to guard against the continuing electronic publication of the expunged or altered information. *Id* at 24. Where state rules provide certain types of offences remain for a short-term on the transgressor's record the *Guidelines* recommend that, depending on whether the short-term retention policy is intended to cut down on the paper being held by the court or to clear the

Individual states must also make a policy decision on whether an identification track should be kept of persons requesting information and the type of information that they request.[127] The benefit of keeping track of logs of information by different persons is that this information might assist in locating stalkers, keeping track of errors on the court record, and collecting fees.[128] The benefits, however, must be balanced against the "inconvenience, intrusiveness and chilling effect" on access of such activity.[129] Where the court decides to keep a log, users should be advised of this policy.

Certain documents in court records should be made remotely accessible[130] to the public except where public access is restricted under other sections in the *Guidelines.*[131] These include indexes to cases filed in the court; listings of new cases including the names of the parties; registry of actions indicating documents already filed in the case; calendars of dockets of court proceedings including the case number and caption, date and time of hearing and location of hearing; judgments, orders or decrees in cases and liens affecting title to real property.[132]

The rationale behind providing greater access to these documents is that there is not a high risk of harm to an individual or unwarranted invasion of privacy when these

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wrongdoer's record, the court delineate a policy providing for how electronic access to these records will be handled. Where the short retention policy is intended to clear the records, the *Guidelines* suggest that either the electronic record not be accessible to the public or no electronic record be kept of the infringement. *Id* at 25.

[127] *Id* at 25.

[128] *Id* at 26.

[129] *Id.*

[130] "Remote access" as defined by the *Guidelines* is the ability to electronically search, inspect or copy information in a court record without "visiting the court facility." *Id* at § 3.40. This term is broad enough to encompass several types of technology and does not limit the technology that the individual state may adopt. The Internet or a dial up system would fall within the definition but attachments to e-mail; mailed or faxed copies would not be within the definition of "remote access." GUIDELINES, *supra,* at 19.

[131] *See ss.* 4.20

[132] *Id* § 4.20(a)- (e).

documents are released.[133] This list, however, does not exhaust the documents that a court should make accessible remotely.[134] Remote access is beneficial because it is cost effective and prevents the waste of public resources and court staff hours in locating documents for each requestor.[135] To guard against problems where court information changes such as a felony conviction being reduced to a misdemeanor, the *Guidelines* recommend a disclaimer.[136]

The *Guidelines* also provide for access to bulk distribution[137] of any publicly accessible information on the court record.[138] The costs of updating existing online systems to facilitate separating publicly accessible information from restricted information in compiling bulk data may offset the benefits of access to this data.[139]

The difficulty in maintaining current records is another problem which plagues the process of transferring data in the court's record to databases not within the court's control, in order to facilitate bulk distribution is.[140] The distribution of inaccurate, dated information can lead to a reduction in the public's confidence in the court system.[141] In the case of the bulk distribution, the issues of accuracy in the records and timeliness in their upgrading are more important and individual state courts need to enforce these standards.[142]

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[133] *Guidelines, supra* at 27

[134] *Id.*

[135] *Id* at 28.

[136] *Id.*

[137] "bulk distribution" is defined as the "distribution of all, or a significant subset of the information in court records, as is and without modification or compilation."(*Id see* §4.30(a)). *See also Maryland Report, supra,* at § II(B) where "bulk data" is defined as "data copied from one or more databases (including copies of entire databases and ongoing regular updates of data." This information can be provided in any format" *(id.)*

[138] *Id.*

[139] *Id.*

[140] *Id* at 30.

[141] *Id* at 29.

These problems arise also in the case of compiled information.[143] Individuals may request compiled information that is publicly accessible and not already available.[144] When such a request is made the court has the discretion whether to provide this information if it determines that providing the information meets the criteria established by the court, resources are available to compile the information and it is an appropriate use of public resources.[145]

The *Guidelines* Committee has recognized that compiling data may be costly and time consuming and interfere with the business of the court and, in the event of this, the courts may refuse to compile the data.[146] However, the Maryland Committee says that competing programming obligations should not, alone, justify the denial of access to a compilation of records.[147]

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[142] *Id* at 31. The *Guidelines* suggest, to guard against this problem, third party information providers should either take the responsibility of maintaining the currency and accuracy of the information or inform the clients of the limitations of the data. In the event of abuses the court could refuse to supply bulk information to the provider. The *Guidelines* also recommends a strengthening of liability on the part of the information providers for information errors and omissions. *Id* at 32.

[143] "Compiled information" is defined as information that is derived from the selection, aggregation or reformulation by the court of some of the information from more than one individual court record (*see* § 4.40.) *See also Maryland Report, supra,* at § II(C): which defines "data compilations" as "data copied or extracted from one or more databases (including copies of entire databases) in response to a request, without ongoing, regular updates."

[144] *Id.*

[145] *Id* § 4.40(b). The Court can delegate the authority to determine whether the information should be provided to the staff or clerk of the court. *Id.*

[146] *Guidelines, supra* at 35.

[147] *Maryland Report, supra,* at 10. In Maryland the Committee recommended that as a matter of policy both requests for data compilations and bulk data be granted. (§IV Recommendations (2)(b) &(c) respectively- 15 members voted in favor of and 3 against access to compilations and 16 in favor of 2 against bulk data.)[147] The first category was to be granted only "where possible," while bulk data requests should be granted where there was compliance with "appropriate registration procedures." (*Id.)* The Maryland Committee recognized that, unlike bulk data, compiled information involves the generation of new court records,[147] but also recognized the public benefit of making these records accessible and, consequently,

The Guidelines allow citizens to request access to bulk distribution[148] or a compilation of information[149] on court records not publicly accessible where the information is to be used for "scholarly, journalistic,[150] political, governmental, research, evaluation or statistical purposes."[151]

Both bulk and compiled information contained in electronic records are skewed being only a subset of all court records, but this problem is expected to diminish as more information is provided in electronic format.[152] Even so, compiled and bulk data are always simply a reflection of the state of the records at a point in time, while information on the court's record is "dynamic, constantly changing and growing."[153]

Under the *Guidelines* a listing must be made of all categories of information only publicly accessible at a court terminal.[154]

Such information falls in the categories of documents not accessible to the public under federal law,[155] state law, court rule or case law.[156] This restriction is a general restriction and not limited to electronic access. The restriction is categorical, not determined on a case-by-case basis.[157]

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providing for better monitoring and evaluation of the operation of the court system and providing for the accountability of the court personnel.[147]

[148] *Guidelines, supra,* at § 4.30(b)

[149] *Id* at § 4.40(c)(1).

[150] In the case of both these provisions the issue is what falls within the definition of "journalistic" research. What research can be determined to be journalistic and whether there is a particular definition of a journalist based on the size of the publication, content or economic base. *Id* at 32.

[151] *Id* at ss. 4.30(b) & 4.40(c)(1). In the case of bulk information the right to request is limited to situations where the "identification of specific individuals is ancillary to the purpose of the inquiry." No such requirement exists in the case of compiled data. *Id.*

[152] *Id* at 32-33.

[153] *Id* at 33.

[154] *Id § 4.50(a).*

[155] *Id* at 4.60(a).

[156] *Id* at 4.60(b).

[157] *Guidelines, supra,* at 45

Federal law restrictions, which do not always apply to state agencies such as courts, are, under the *Guidelines,* applied to court records. The categories that fall within this grouping include social security numbers, federal income or business tax returns, educational information protected by federal law, criminal history information,[158] and research involving human subjects.[159]

Prohibition of access to court records under state statutes, rules and case law will vary according to the individual state. Two categories of restrictions exist in this regard. Those in which access to the entire court record is restricted and those where parts of the record must be deleted before making it publicly accessible.

The first category includes issues relating to children,[160] mental health proceedings,[161] and sterilization proceedings.[162]

The second category includes names, addresses, telephone numbers, e-mails or places of employment of victims,[163] or witnesses,[164] informants,[165]and potential or sworn jurors in a criminal case.[166] The category also includes wills deposited with the court for safekeeping, medical and mental health records, psychological evaluations, financial information providing identifying account numbers on assets and liabilities, credit card or Personal Information Numbers, state income or business tax returns, proprietary business information including trade secrets, juror questionnaire information and grand jury proceedings are also within this category as are pre-sentence investigation reports and search and arrest warrants and affidavits.[167]

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[158] Note that while there are federal and state laws preventing the release of criminal history information, nothing prevents its release once it becomes part of the court records (*Id* at 47).
[159] *Id* at 47.
[160] *Id* at 48. These include juvenile dependency, abuse, adoption proceedings (*Id.)*
[161] *Id.*
[162] *Id.*
[163] *Id.* Particularly in sexual assault cases.
[164] *Id.* Particularly in criminal or domestic violence cases (*Id* at 48.)
[165] *Id.* In criminal cases (*Id* at 48.)
[166] *Id* at 48.

Litigants or individuals identified in records can request that public access be limited to a court facility[168] and, where there is good cause, the court will limit the manner of access.[169]

In determining whether the request for restricted access should be granted, the court should take into account the risk of injury to individuals, individual privacy rights and interests, proprietary business information, and public safety.[170] The court is mandated to use the least restrictive means to achieve the purpose of the access policy and needs of the requester.[171]

The Maryland Committee makes no recommendation regarding making such applications. In Maryland there was a general recognition by the Committee that court ordered sealed records and existing statutory provisions in the state were effective in protecting privacy interests in relation to the release of paper court records.[172]

The Maryland Committee also did not see the need to take measures to protect information contained in dockets, even though they included identifying information, such as name, address, date of birth, height, weight, sex and race.[173] The Committee determined that the protections afforded by statute and the court's seal were sufficient and the identifying information should be retained in order to accurately identify the parties.[174]

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[167] *Id* at 48-49.
[168] *Id,* at 4.70(a).
[169] *Id* at 4.70(a).
[170] *Id* at 4.70(a)(1)- (4).
[171] *Id* at 4.70(a).
[172] *Maryland Report, supra,* at § IV 3(a). Note that 16 members of the Committee voted in favor of and two against the position that court orders sealing the records and statutes were sufficient safeguards for individual privacy issues.
[173] *Id* at § IV3(b).

However, [175]the Maryland Committee recognized that the nature of some information in case files[176] might necessitate new rules to protect the privacy of individuals along with the statutory and sealing mechanisms already in place.[177]

The Guidelines state that the consideration of whether to limit access should be made on a case-by-case basis and the categories used as guidelines for the states in determining what information should be limited.[178] Anyone identified in a case is entitled to request this restriction.[179]

The individual court should determine the decision as to whether access to information on the existence of this information should be prohibited.[180] There is no restriction on the time when the request can be made so that arguably it can be made even after the court has concluded its session.[181]

In addressing the necessity to minimize the amount of information made inaccessible, individual states must determine whether the redaction of certain information on the record would serve the intended purpose as effectively as removing all access to the document. If the redaction would be sufficient, feasible and affordable the

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[174] *Id.* Note that 16 members of the Committee voted in favor of and two against the position that court docket information should be publicly accessible except where prohibited by statute or an order of the court.

[175] The Committee noted that these were mostly not yet available electronically, but expected with improved technology that they would become available (*id* at § 4(3)(c).

[176] *Id.* They suggest bank account numbers and medical records as examples.

[177] *Id.*

[178] *Guidelines, supra,* at 54.

[179] *Id.*

[180] *Id* at 55.

[181] *Id.*

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court should use this method instead of restricting all access to the information.[182] The court might also look at the effectiveness and feasibility of limiting electronic access to the information alone while retaining paper access.[183]

A criticism of the *Guidelines* is that it does not prevent the information from being available on the private electronic database of a third party.[184] Arguably since the information is publicly available at the courthouse anyone could go to the courthouse, make notes of the restricted information and feed it into their database making the restricted information accessible to the world through this means.[185] Apart from the fact that access via a private database would defeat the purpose of the restriction,[186] there is a greater possibility that the data entered in this unauthorized manner may have errors.[187]

Under the *Guidelines* "any member of the public" may apply for access to court records to which access has been prohibited under sections 4.60 or 4.70(a).[188] In determining whether there are sufficient grounds to continue prohibiting access, the court should consider risk of injury to individuals,[189] individual privacy rights and interests,[190] proprietary business information,[191] access to public records,[192] and public safety.[193]

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[182] *Id* at 55.

[183] *Id.* The aims of sections 4.50, 4.60 and 4.70 are specifically to limit risk of injury to the individual and other negative impacts of the release of information. The *Guidelines* suggest as an alternative that remote electronic access be made available only by subscription or with limited access on a case-by-case basis. *Id* at 32.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] Sections 4.60 and 4.70 do not address the issue of remedies for violation of these prohibitions on access.

[188] *Id* at § 4.70(b). This request is required to be made by a written motion to the court (*see* § 4.70(c)) and if the prohibition was made pursuant to a request by another member of the public the court must advise this person of the request to access the information (*id.)*

[189] *Id* at § 4.70(b)(1).

[190] *Id* at § 4.70(b)(2).

[191] *Id* at § 4.70(b)(3).

[192] *Id* at § 4.70(b)(4).

Courts are mandated to specify a time period during which records are accessible[194] and records available for remote access should also be accessible at least during the hours when the paper documents are accessible at the courthouse.[195] Although the section leaves the decision up to the court of whether electronic access will be available 24 hours a day, the Committee encourages courts to adopt a 24-hour system.[196]

The court must let requestors know whether the information is available and provide the information in reasonable time.[197] The promptness of the response will vary with the specificity of the request, the amount of information requested, how easily accessible the information is,[198] and the amount of court resources needed to satisfy the request.[199]

In cases where the information is available electronically it is suggested to provide terminals or computers for the public throughout the courthouse and public libraries thereby facilitating members of the public who do not have the facilities at home to access the information.[200]

The *Guidelines* authorize charging a reasonable fee for electronic access, remote access or to access bulk distribution or compiled information.[201]

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[193] *Id* at § 4.70(b)(5). The rationale for allowing the courts to reconsider access to documents prohibited from public access in the past is to facilitate and take into account changing circumstances rendering the old laws or court rulings unnecessary.[193]*Guidelines, supra,* at 56.

[194] *Id* at 58.

[195] *Id* at § 5.00(a).

[196] *Guidelines, supra,* at 58.

[197] *Id* at § 5.00(b).

[198] *Id* at 58. Whether it is at another site or not.

[199] *Id* at 58. To facilitate a timely response the Committee suggests the appointment of a custodian of the records to respond to these requests. *Id* at 59.

[200] *Id.*

[201] *Id* at § 6.00.

In the case of remote and electronic access the Committee only notes that these fees should not be prohibitive.[202] However, in the case of bulk and compiled information the Committee suggests the fees should reflect the cost of staff time to produce the document.[203]

In Maryland the Committee recommended that fees could be charged for accessing electronic data.[204] However, the Committee was "divided on whether as a matter of policy fees should not exceed the 'actual and reasonable' costs of providing access to the information"[205] and whether the court should bear all or part of the cost of access.[206]

The *Guidelines* impose an obligation on vendors where the court contracts with vendors to provide electronic access to court records, to maintain these records,[207] in a manner consistent with the aims of access policy.[208]

The *Guidelines* suggest that a term of the contract with the Vendor should include an undertaking for the vendor to educate litigants, the public, employees and contractors

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[202] *Guidelines, supra,* at 60.
[203] *Guidelines, supra,* at 60. The *Guidelines* also do not make provisions for situations where the citizen is unable to pay.
[204] *Maryland Report, supra,* at § IV(2)(d).). Note that 17 members of the Committee voted in favor of and one against charging fees for electronic access to court records *(Id.)*.
[205] *Id* at 10.
[206] *Id.*
[207] *Id* § 7.00(a).
[208] *Id* at 7.00(a). The rationale behind this section is to regulate the vendors and "limit the liability of the court" for harm caused by the release of information by a third party. It effectively extends the *Guidelines* to third party contractual providers. (*Id* at 62.) The section applies to a wide range of activities ranging from copies of electronic court records maintained by the court itself or an executive branch to making and keeping the verbatim record. *(Id* at 62- 63.) Where the vendor has the exclusive right to disseminate the court records the issue of compliance is more important, and courts must ensure against providers using their control to limit access to certain people. (*Id* at 63.)

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about the provisions of the access policy[209] and notify the court of requests for compiled information on bulk distribution.[210]

Individual states should also decide whether to include a contractual obligation to require regular update in the vendor's database to conform to the court's database, forward complaints received about the accuracy of information, and establish a process to monitor the vendor's compliance with the policy.[211]

The Court is required to make information available to litigants and the public of information made publicly accessible and how to request the information or apply for a restriction on the manner of access.[212]

Judges and court personnel are also be educated by the clerk of courts about the access policy to ensure their conformity with the policy.[213]

Additional recommendations made by the Maryland Committee included the need for courts to implement procedures to ensure accuracy and to educate the public about correcting errors.[214] The Committee also recommended the implementation of uniform public access throughout the state by developing guidelines maximizing quality service, efficiency and minimizing the burden of the court personnel in responding to requests.[215] The Committee encouraged the future computerization of court records[216] and the

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[209] *Id* at § 7.00(b).

[210] *Id* at § 7.00(c). This is intended to promote a public understanding of the public's right to access court information and to allow the court to control the release of information in its records.[210]

[211] *Id.*

[212] *Id* at § 8.10. The *Guidelines* do not specify the nature, or extent of the information required to be made available. However, access to court records means nothing unless the public is aware of its right, including litigants who may be unaware that the information is remotely accessible and that they can take steps to attempt to limit its accessibility.

[213] *Id* at § 8.30.

[214] *Maryland Report, supra,* at § IV(4).

[215] *Id* at § IV(5).

[216] *Id* at § IV(6).

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implementation of integrated or compatible systems and sharing of technological experiences across the state, and ongoing working groups of court administrators, technology staff and outside experts to study and make policy recommendations.[217]

What happened in Florida...

In Florida access to information is guaranteed by court rules,[218] statute and by the Constitution.[219]

The records determined to be confidential under the court rules[220] include memoranda, drafts of opinions and orders, notes, and other written materials prepared by the judge or his staff as part of the court's judicial decision-making process and used in determining cases;[221] administrative memoranda or advisory opinions requiring confidentiality to protect a compelling governmental interest, which, on the court's finding, cannot be adequately protected by less restrictive measures;[222] complaints of misconduct against judges[223] or other entities or individuals licensed or regulated by the courts,[224] until a finding of probable cause is established, unless otherwise provided; judge evaluations aimed at assisting the judges in improving;[225] names and qualifications of court volunteers.[226] Other documents protected are arrest and search warrants and supporting the affidavits before their execution;[227] records confidential under the Florida and United States Constitution;[228] records deemed confidential by court rule.[229]

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[217] *Id* at§ IV(7).

[218] *See* Rules of Judicial Administration § 2.051(a) that provides that "...The public shall have access to all records of the judicial branch of government, except as provided below." The section creates a presumption of openness of all court records.

[219] Fla. Constitution, Art. 1, § 24(a) provides "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution..." Note both the Rules and the Constitution provide for the presumption of a right to access court and public records.

[220] Fla. R. Jud. Admin. 2.051, supra at § (c).

[221] *Id* at (c)(1).

[222] *Id* at (c)(2).

[223] *Id* at (c)(3)(A).

[224] *Id* at (c)(3)(B).

[225] *Id* at (c)(4).

The statute also provides that records can be exempted[230] where a court determines confidentiality is necessary to prevent "serious and imminent threat to the fair, impartial, and orderly administration of justice;"[231] protect trade secrets;[232] protect a compelling governmental interest;[233] obtain evidence to determine legal issues in a case;[234] avoid substantial injury to innocent third parties;[235] avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;[236] comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law;[237]

Under the statute the "degree and manner of confidentiality ordered by the court should be no broader than necessary to protect the relevant interests;[238] there should be no less available restrictive measures to protect the relevant interests;[239] and reasonable notice should be given to the public of orders closing a court record.[240]

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[226] *Id* at (c)(5).
[227] *Id* at (c)(6).
[228] *Id* at (c)(7).
[229] *Id* at (c)(8). These include the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission.
[230] *Id* at (c)(9).
[231] *Id* at (c)(9)(A)(i).
[232] *Id* at (c)(9)(A)(ii).
[233] *Id* at (c)(9)(A)(iii).
[234] *Id* at (c)(9)(A)(iv).
[235] *Id* at (c)(9)(A)(v).
[236] *Id* at (c)(9)(A)(vi).
[237] *Id* at (c)(9)(vii).
[238] *Id* at (c)(9)(B).
[239] *Id* at (c)(9)(C).

Recommendations of the Judicial Management Council…

Before 2000 court records in Florida were available to the public by Internet.[241] Concern over privacy issues led the Supreme Court to ask the Judicial Management Council to examine the manner in which access to court records could be balanced with privacy interests in the State.[242] The issues raised by the Court for inquiry were:

1. Whether the Supreme Court plays a role in the determination of statewide polices on access to information?[243]
2. If the state does have a responsibility to develop these policies, the steps that should be taken to ensure these policies are developed and implemented?[244]
3. Whether there should be a moratorium on electronic access to certain court records until policies are developed and implemented.[245]

The Management Council found that Article V, section 2 of the Florida Constitution gave the Supreme Court broad responsibility for the administrative supervision of all courts, "including setting policies regarding court records."[246]

The Council, though recognizing the benefits of the new technology in facilitating "efficiency, effectiveness and openness of the courts,"[247] cautioned the Court to consider the negative impacts of electronic access, such as undermining public trust and confidence.[248]

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[240] *Id* at (c)(9)(D).

[241] *In Re: Report and Recommendations of the Judicial Management Council of Florida on Privacy and Electronic Access to Court Records*, Fla. L. Weekly S 933 at 2(2002).

[242] *Id.*

[243] *Id* at 3.

[244] *Id.*

[245] *Id.*

[246] *Privacy and Electronic Access to Court Records Report and Recommendations Judicial Management Council* at 3. *Available at* http://www.flcourts.org/pubinfo/documents/privacy.pdf.

[247] *Id* at 3.

In answering the second question, the Council drew from the experience of other states to identify the following policies as appropriate for developing strategies to implement online access to court records:[249]

- ▶ Creating and implementing appropriate policies is a complex and ongoing task;
- ▶ Broad citizen participation is required in the process,
- ▶ The Judicial Management Committee should oversee the development of policy recommendations in the area.[250]
- ▶ The Council should create a committee to study the issue.[251]

In relation to the question of whether a moratorium should be imposed, the Council recommended that the moratorium be imposed[252] since, in the absence of a statewide policy, there would be a risk of injury to individuals by the release of confidential information.[253] Thus, the Council recommended that the Chief Justice issue an order directing the clerks not to provide electronic access to images of court records until further notice.[254] The Council said, however, the restriction should not apply to docket and case information.

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[248] *Id.*

[249] *Id* at 4.

[250] *Id.*

[251] *Id.* In addition to council members the Committee should include representatives of the Florida Association of Court Clerks, the Florida Bar, the Governor's legal office, both houses of the Legislature, the Florida Council of 100, and judges from the appellate, circuit and county courts, representatives of a privacy interest group, media advocacy group, law enforcement, appellate court clerks, trial court administration, court committees with responsibility for technology, case management and performance accountability and others who could assist the committee. *Id.*

[252] *Id* at 5.

[253] *Id.*

[254] *Id.*

In *Re Report and Recommendations of the Judicial Management Council of Florida on Privacy and Electronic Access to Court Records*[255] the Supreme Court acknowledged its role in formulating policies on access to court records.[256] However, to protect against redundancy, the Court deferred making a decision on the Council's Report because the Legislature had exercised its "parallel initiative" to form and fund a study committee, including members of the judiciary, to examine the issue of making court records accessible to the public electronically.[257] The Court also recognized that the legislature had established a temporary moratorium prohibiting placing on the Court's website images of a military discharge; a death certificate, or a court file, record, or paper relating to matters or cases governed by the Florida Family Law Rules of Procedure, the Florida Rules of Juvenile Procedure, or the Florida Probate Rules, until appropriate Court rules were determined.[258]

The Committee on Public Records…

The Florida Legislature created the 22-member Committee on Public Records in 2002 to study the effect of advanced management technologies on the collection and dissemination of court records and official records and the balancing the right to access this information with the right to privacy in Florida.[259] The process of preparing the

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[255] . Fla. L. Weekly S 933 at 7(2002).

[256] *Id* at 9.

[257] *Id* at 8-9. CS/HB 1679 which became law on June 5, 2002 created a 21 member Study Committee on Public Records to comprehensively address issues regarding electronic access to court records. *Id* at 9 Footnotes. Justice R. Fred Lewis dissented in part because he said, although he did not want duplication of effort and expenditure, the Court "should play a significant role in formulating policy." *Id* at 11.

[258] *Id* at 10. CS/HB 1679 also included a limited Moratorium. Justice R. Fred Lewis dissented in part because he said, although he did not want duplication of effort and expenditure, the Court "should play a significant role in formulating policy." *Id* at 11.

[259] *Study Committee on Public Records: Examination of the Effects of Advanced Technologies on Privacy and Public Access to Court Records and Official Records Final Report*, February 15, 2003 at 4. Nine of the members served in an advisory, non-voting capacity, functioning to inform the study committee about

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Report included nine 6-hour meetings including public hearings in Orlando and Miami; reviewing documents, literature and other sources; taking public testimony; and hearing from representatives from other agencies.[260] At the end of the process, by February 15, 2003, the Committee had developed a chart of conceptual recommendations each of which was voted on to determine the final recommendations which were prepared for submission to the Governor, Chief Justice of the Supreme Court, President of the Senate and Speaker of the House of Representatives.[261]

The final recommendations of the Committee on how the state should proceed in implementing its court online access policy[262] include:

- A re-examination by the Supreme Court of Family Law Rules of Procedure[263] which provides for the mandatory disclosure of documents during discovery and interrogatories in order to minimize the collection and filing of unnecessary personal and identifying information while allowing "exchange of meaningful substantive information between the parties and, if necessary, access to the court."[264]
- Free electronic access to official records unless they are confidential or exempt from disclosure under Florida law.[265]

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information contained in agency records on sensitive children and family issues which might necessitate exemption from public disclosure (*id.*)

[260] *Id* at 4. This includes departments of Children and Family Services, Education, Health, Highway Safety and Motor Vehicles, Juvenile Justice, Law Enforcement and Revenue (*Id.*)

[261] *Id* at 5. The Committee indicated that time constraints prevented it from giving a detailed analysis of the situation.

[262] *Id* at 6.

[263] §12.285

[264] *Id* at 6.

[265] *Id* at 6. This position applies the presumption of openness of court records under Florida Court Rules to electronically held court records. *Id* Fla. Rules of Judicial Administration § 2.051.

- a two-year period for the court to study and develop rules to govern electronic access to court records, during which period court records not deemed to be part of the Official Records[266] by the Florida Supreme Court should be inaccessible on the Internet or by bulk access.[267]

- Florida Supreme Court adopting rules for procedure in line with public records laws, for the receipt and dissemination of publicly accessible information contained in court records. In defining these rules the court should take into consideration the need to implement uniform processes for controlling or minimizing the influx of unnecessary sensitive, personal and identifying information in paper and electronic form;[268] using redaction to prevent against disclosing confidential and exempt information;[269] collecting sensitive, personal and identifying information for court management purposes;[270] and posting and distributing a privacy notice informing the public of their legal rights.[271]

- The Florida Supreme Court should review and submit to the Legislature categories of information which it legitimately needs and collects which, though not currently confidential, should be confidential to protect the privacy and safety of the public.[272]

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[266] The Judicial Management Council distinguishes between "official records" which the clerk is required to or authorized to record; and "court records" defined under Florida Court rules as "the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, video tapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes or stenographic tapes of court proceedings." *See* Fla. R. Jud. Admin. 2.075(a)(1)(2002).

[267] *Id* at 6-7.

[268] *Id* at 7.

[269] *Id.*

[270] *Id.*

[271] *Id.* The principles espoused by this recommendation echo those of the *Guidelines*, supporting the presumption of a right to access court records by relying primarily on methods such as redaction and not posting personal information to protect privacy rights. It also, like the *Guidelines*, recognizes the need to inform users of their rights in order to make the policy effective. *See Guidelines supra*, § 8.00.

- A review by the Legislature of existing categories of confidential or exempt information in public court records, the reason for this confidential or exempt status; and whether they should continue to enjoy this status.[273]
- An interim project or task force focusing on reviewing laws, policies and practices and technological resources impeding interagency exchange and flow of confidential or exempt information relating to children interests between agencies and the court and public record exemptions intended for the protection of children to determine whether and to what extent they do greater harm than good for the children.[274]
- There should be a study by a taskforce on "Clerk of the Court: Custodial Duties Including Redaction"[275] to look at issues including the financial and logistical issues involved in redacting confidential or exempt information in court and official records,[276] who should be responsible for redaction of court records,[277] criminal or civil liability for failure to redact and for the unauthorized or inadvertent disclosure of confidential or

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[272] This should be in accord with the provisions of the Sections 23 and 24 of Article 1 of the Constitution which provide respectively for the right to privacy and to access records. The Committee's recommendations appear to contemplate a partnership between the legislature and the judiciary in balancing the issues raised by electronic access to court records. This section highlights the role of the court as the active body in the partnership identifying information that could raise privacy issues that might be overlooked by the legislature. This role is in accord with that suggested by Justice Lewis in *Re: Recommendation, supra,* 10.

[273] *Id* at 7. This recommendation recognizes the principle in the *Guidelines* § 4.70(b) of reviewing existing prohibitions to bring them in line with current trends. However, in this case the onus is on the legislature rather than the judiciary to review the relevance of the law. Perhaps in the review process both bodies should contribute.

[274] *Id* at 8.

[275] In its recommendations the Council also recognized clerks of courts as official custodians of court records. *See Judicial Council Report, supra,* at 7.

[276] *Id.*

[277] *Id.*

exempt information resulting in unwarranted, inadvertent or unlawful invasion of privacy or damage to personal or professional reputation.[278]

- Enactment of statutory definition for redaction to assist the clerks of court managing confidential or exempt information in court records, official records, and public records along with the constitutional guidelines for public access.[279]
- Statutory multi-year project initiative reorganizing and co-locating fee provisions for accessing public records in the Florida Laws and general public record policies,[280] and reducing the redundancy of multiple exemptions affecting the same confidential or exempt information applicable to different entities.[281]
- A review of all public record exemptions every five years by the Legislature.[282]
- Legislation placing greater responsibility on credit card companies, reporting bureaus, or commercial entities for implementing better protective measures against fraudulent use or misuse of identifying information, cooperating better with victims to identify theft or fraud in resolving credit history problems. Propose joint resolution to Congress regarding state input on sunset review of the Fair Credit Reporting Act.[283]

Conclusion…

The guidelines identified by the Florida Committee on Public Records are in line with the *Guidelines* identified for State courts. Commissioned by legislature, the Florida proposal takes a more global approach to the issue of electronic access to court records, identifying the functions of both the courts and the legislature.

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[278] *Id.* In keeping with the presumption of access to court records this recommendation puts in place ample redaction measures to protect privacy while allowing access to court records.

[279] *Id.*

[280] FLA. STAT. ch. 119

[281] *Id.*

[282] *Id.*

[283] This section aims to share responsibility with commercial bodies to protect and indemnify it customers against identity theft.

The paper also identifies important principles such as the need to use redaction where possible. It has also espoused, as one means of preventing the inappropriate release of private information, the need for courts to control the influx of unnecessary, sensitive information. This principle was not identified in the *Guidelines.*

However, the concepts as outlined in the study are vague notwithstanding the fact that the Committee had much wider room, than available for the State *Guidelines,* to make concrete suggestions on policies, dealing as it did with one state as opposed to all states across the nation.

No attempt was made to identify the documents which would be subject to remote access as opposed to those available electronically only at the courthouse. Key concepts such as "remote access" were not defined. The Report has basically left the court at the same place it was at after the Judicial Management Council made its recommendations. Both the Council and the Committee have identified the need for the court to study and develop rules for access to electronic court records. This appears to be the next step that the Florida Supreme Court will have to take. Thus, the work of the committee duplicates that of the council in that it does not determine the answer to the question what should be included in Florida's electronic access policy. Instead it focuses on the procedure that should be taken in determining the policy.

THE CHICKENS HAVE COME HOME TO ROOST:
INDIVIDUALISM, COLLECTIVISM, AND CONFLICT IN COMMERCIAL SPEECH DOCTRINE

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Using individualist and collectivist political philosophies, this paper analyzes the Supreme Court's conception of commercial speech protection since 1980. It concludes that the Court's commercial speech doctrine has suffered from a fundamental internal conflict arising from the difficulty in choosing one or the other of those political philosophies, and suggests that that conflict will continue—as will the Court's inability to express a coherent commercial speech doctrine—until the Court makes an overt choice between collectivist and individualist approaches to the protection of commercial speech.

THE CHICKENS HAVE COME HOME TO ROOST: INDIVIDUALISM, COLLECTIVISM, AND CONFLICT IN COMMERCIAL SPEECH DOCTRINE

In 1976 the United States Supreme Court reversed a long-standing tradition of not protecting commercial speech under the First Amendment.[1] After several years of dealing with this new area of the law case by case, in 1980 the Court outlined what it hoped would be a logical test for when commercial speech could be regulated.[2] In doing so, the Court entered an era of confusion over how it, and the country, would view commercial speech within the context of the First Amendment.

The Court had two logical options for how to treat commercial speech. First, as it had done prior to 1976, the Court could refuse to protect commercial speech under the First Amendment, and instead allow regulations to protect consumers from speech that society would rather they not hear. That approach would place social interests and needs over traditional First Amendment values of access to information and the right to express points of view. Second, the Court could grant commercial speech protection commensurate to that given noncommercial, or ideological, speech, and treat commercial speech regulations with strict scrutiny, allowing only content-neutral time, place, and manner[3] restrictions or those based on a clear and present danger test.[4] These two approaches arise from competing political philosophies—collectivism and individualism—that have a history in both American society and First Amendment jurisprudence. But the Court has adopted neither; instead it has tried to carve a path between the two, using the language of one but applying the other. This has created dissension, confusion, and nearly continual calls for clarity among the justices since 1980. This strife among the justices is seen in struggles over the definition of commercial speech, the purposes of protecting commercial speech, the abilities of audiences to discern "good" from "bad" commercial speech, and the basic understanding of whether protection belongs to audiences for or speakers of commercial speech.

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[1] The Court did so in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), a case involving whether pharmacists could include prices in advertisements.

[2] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980).

[3] Current time, place, and manner doctrine comes from *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), which allowed regulation of speech based on time, place, and manner if the regulation was narrowly tailored to serve a substantial government interest and left alternative channels for communication.

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This article traces the development of those four struggles since the Court's attempt to clarify commercial speech protection with the *Central Hudson* test in 1980. First, it sketches the contours of individualist and collectivist political philosophies. Second, it uses those philosophies to analyze the justices' conceptions of the definitions and purposes of commercial speech protection. Finally, it concludes that the Supreme Court's articulation of commercial speech doctrine since 1980 has suffered from a fundamental internal conflict arising from its difficulty in choosing one or the other of those political philosophies, and suggests that that conflict will continue—as will the Court's inability to express a coherent commercial speech doctrine—until the Court makes an overt choice between collectivist and individualist approaches to the protection of commercial speech.

COLLECTIVISM AND INDIVIDUALISM

In Supreme Court cases, discussion of the protection of commercial speech focuses on two key questions: First, should commercial speech be protected under the First Amendment and why, and second, what expression should be considered commercial speech? The discussions that arise in answer to these questions are in turn based on particular conceptions of the First Amendment, the purposes of the media and commercial speech in U.S. society, and the balance between individual rights and collective goals. This article focuses on two strands of political philosophy that have characterized the Supreme Court's discussions of press freedom.[5] "Individualist" philosophies, including libertarianism and natural law, suggest that individual rights are normally paramount over social goals, and as such must be protected from infringement by government and society. They tend to see rights as "natural," independent of particular governmental systems and therefore deserving of significant protection against the wishes of society.[6] "Collectivist" philosophies, including social responsibility and communitarianism,[7] emphasize community values and goals rather than individual rights, and suggest that societies may define for themselves what values they will hold and promote.

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[4] Current clear and present danger doctrine was outlined in *Brandenberg v. Ohio*, and allows prohibition of political speech only on a showing of "incitement to imminent lawless action" 395 U.S. 444, 449 (1969).
[5] *See, generally*, ELIZABETH BLANKS HINDMAN, RIGHTS VS. RESPONSIBILITIES: THE SUPREME COURT AND THE MEDIA (1997).
[6] For discussions of various aspects of libertarian theory as applied to the U.S. mass media, see JOHN C. MERRILL, THE IMPERATIVE OF FREEDOM (1974); EXISTENTIAL JOURNALISM (1977); THE DIALECTIC IN JOURNALISM (1989).

Individualist philosophies arise primarily from libertarian political theory as outlined in the seventeenth through nineteenth centuries by such writers as John Milton, John Locke, and John Stuart Mill. In 1644 Milton published his now-famous work *Areopagitica*, in which he argued for freedom of thought and the press. Milton based his view on the idea that individuals, when given access to all information and opinion, will distinguish falsehood from truth and follow the latter. The most important freedom, Milton maintained, was that of thought: "Give me the liberty to know, to utter, and to argue freely according to consciences, above all liberties."[8] In his explanation of libertarian theory, Fred S. Siebert summarizes Milton's views this way: "Let all with something to say be free to express themselves. The true and sound will survive; the false and unsound will be vanquished. Government should keep out of the battle and not weigh the odds in favor or one side or another."[9] Half a century after Mill, Locke continued the argument, suggesting that political power should reside in the people, not the monarch, and that the law of nature is reason, which "teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."[10] As Siebert notes, these and other writers of the Enlightenment period had a new philosophical point, that people should be free "from all outside restrictions on [their] capacity to use [their] reason for solving religious, political and social problems."[11] And over a century after Locke, Mill built upon Milton's ideas, suggesting in *On Liberty* that expression should be protected because ideas might be true or might contain an aspect of truth, and because to censor supposedly false opinions assumes the infallibility of the censor. Mill, too, placed great faith in humanity: "Judgement is given to men that they may use it."[12]

In his summary of libertarian theory, Siebert applied it directly to twentieth-century media.[13] The functions of media in a libertarian society are, among others, to serve the political system through providing information, assist in educating the public, and serve the economic system "by bringing together buyers and sellers of goods and

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[7] For a general discussion of the concept of rights within communitarianism, see AMITAI ETZIONI, RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE (1995).
[8] JOHN MILTON, AREOPAGITICA (1644), *excerpted in* THE JOURNALIST'S MORAL COMPASS, 13, 19 (Steven R. Knowlton & Patrick R. Parsons eds., 1994).
[9] FRED S. SIEBERT, THEODORE PETERSON & WILBUR SCHRAMM, FOUR THEORIES OF THE PRESS 45 (1956).
[10] JOHN LOCKE, TWO TREATISES ON GOVERNMENT 271 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).
[11] SIEBERT ET AL., *supra* note 9, at 43.
[12] JOHN STUART MILL, ON LIBERTY 78 (Gertrude Himmelfarb ed., Penguin Classics, 1988) (1859).
[13] For an update and commentary on Siebert's work and the libertarian and social responsibility theories of the press, see LAST RIGHTS: REVISITING *FOUR THEORIES OF THE PRESS* (John C. Nerone ed., Univ. of Illinois Press, 1995).

services through the medium of advertising."[14] Key to the success of this type of political system would be a hands-off state that "did not have the right to restrict that which it considered false and unsound."[15]

Individualist philosophies value individual abilities, which early writers argued included the power of reason, and individual natural rights, which included the rights of thought, expression, property, and life. Very much related to these discussions is the concept of natural law. Modern natural law theory focuses on general moral principles, such as justice and equality, that its proponents claim undergird judicial interpretation of laws. Ronald Dworkin, in particular, writes that when faced with conflicting laws judges use principles as a guide in creating new, common law. These principles are followed because they are "a requirement of justice or fairness or some other dimension of morality."[16] When judges cannot rely on precedent or when precedent obviously conflicts with current moral standards,[17] Dworkin argues, judges use principles to justify their decisions that enhance individual rights.[18]

Moral principles form the basis for protection of individual rights, and those principles are strong in part because they are based on libertarian beliefs in natural rights that exist independently of governmental systems. An example of principle involving First Amendment freedoms comes from legal scholar Thomas Emerson, who explained several reasons why democratic societies protect free expression. First among those, Emerson wrote, is that "freedom of expression is essential as a means of assuring self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being."[19]

While this reason for protecting expression comes from a principled, or individual-rights-based, argument, not all legal decisions use moral principles or individual rights as a foundation. Dworkin suggests that judges also rely on what he terms "policies," which reflect collective goals. Like principles, policies can protect individual rights, but under policies those rights have no intrinsic value. Instead, they are protected because they serve some larger social goal. Consequently, when rights are justified by policy those rights can be changed, diminished or abandoned if the social goal they are based upon changes.[20] Basing individual rights on policies, rather than principles, significantly weakens them, Dworkin argues. In addition, policies can be balanced against each other, when either no principles, or individual rights, are involved or when rights are cast in terms of social goal or policy and weighed against another social goal or policy. Emerson's other reasons for protecting speech are articulated primarily as policy:

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[14] SIEBERT ET AL., *supra* note 9, at 74.
[15] Id. at 51.
[16] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 23 (1977).
[17] A clear example here is *Brown v. Board of Education* 347 U.S. 483 (1954), in which the Supreme Court declared the "separate but equal" concept of *Plessy v. Ferguson*, 163 U.S. 537 (1896) unconstitutional.
[18] An example of this is seen in Justice Harlan's opinion for the Court in *Curtis Publ'g Co. v. Butts*, 87 S.Ct. 1975, 1988 (1967), when he wrote of the "guarantee to individuals of their personal right to make their thoughts public."
[19] THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

> Second, freedom of expression is an essential process for advancing knowledge and discovering truth….The reasons which make open discussion essential for an intelligent individual judgment likewise make it imperative for rational social judgment. Third, freedom of expression is essential to provide for participation in decision making by all members of society…..Finally, freedom of expression is a method of achieving a more adaptable and hence a more stable community…[21]

In a study of 60 years of Supreme Court press cases, Hindman found that despite individualist rhetoric, the Court tended to use policy to justify press freedom, particularly using Emerson's second and third rationales, which correspond directly to Hodges' education and political functions of the media.[22]

Policies based on collective goals are a hallmark of collectivist philosophies, which generally value social needs or interests over those of individuals. Individual rights are important but can be subordinated to social goals, collectivists argue, in part because individual rights do not exist *independent of* society but in are in fact *granted by* society. This challenge to the basic precept of libertarian theory came about in a confluence of scientific, psychological, economic, religious, and philosophical developments around the beginning of the twentieth century. Charles Darwin's ideas of evolution and natural selection and Sigmund Freud's study of the mind challenged the notion that humans are innately rational. Theologians and social observers noted that Adam Smith's concept of *laissez-faire* economics had led not to a moral, capitalist system but to one in which the division between rich and poor, owners and workers, widened.[23] William James, John Dewey and others had begun the Pragmatist movement in philosophy, which stressed individuals' relationship with their communities and dependence upon each other.[24] As Siebert put it, the "revolution in modern thought has all but demolished the world view which supported the libertarian theory of the press."[25]

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[20] For example, the Court used social needs to justify its decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), when it held that the need for law enforcement to gather material related to a crime was more important than the need for news organizations to protect their newsrooms from searches.

[21] EMERSON, *supra* note 18 at 6-7.

[22] HINDMAN, *supra* note 5. For another discussion of educational and political functions of the media, see Louis W. Hodges, *Defining Press Responsibility: A Functional Approach*, *in* RESPONSIBLE JOURNALISM 13 (Deni Elliott ed., 1986).

[23] *See, for example*, WALTER RAUSCHENBUSCH, CHRISTIANITY AND THE SOCIAL CRISIS (1907), UPTON SINCLAIR, THE BRASS CHECK (1920), THE JUNGLE (1906); WALTER LIPPMANN, A PREFACE TO MORALS (1929).

Collectivist theories that arose from these intellectual movements shared several related characteristics or beliefs. First, freedoms or rights do not exist external to governments, but are granted by sovereign people who collectively choose what they will value. The Commission on Freedom of the Press, which studied press freedom and responsibility in the middle of the twentieth century, made the bold claim that "there are no unconditional rights."[26] This is so, collectivists argue, because every right carries with it justifications for its existence—even Milton justified the right of freedom of conscience by explaining that it came from God. On a more earthly level, press freedom is justified, in everyday life and by the Supreme Court, because it benefits society.[27]

Second, because society grants rights, society may also expect something in return. Therefore, with those socially granted rights come responsibilities or obligations to the larger community, or as the Commission on Freedom of the Press put it, "In the absence of accepted moral duties there are no moral rights."[28] Regarding the right of free expression, the concomitant responsibility is in fact to express ideas and seek truth. Individuals and the press, then, are obligated to present opinions, facts, and information to the larger public, and engage in their own search for understanding of issues. Admittedly, errors and falsehoods will make their way into public debate. Those errors should not be intentional, however; nor should bad intent. Under collectivist theories such as social responsibility, "a liar, an editorial prostitute whose political judgments can be bought, a malicious inflamer of unjust hatred—the ground for his [moral] claim of right is nonexistent."[29] The Commission distinguishes between moral and legal rights, however. Just because one shirks her or his moral duty and loses a moral right does not mean she or he gives up the corresponding legal right. In balancing society's emphasis on free expression with its potential abuse, the Commission is not willing to mandate moral behavior. Responsibility, writes the Commission, should not be made "legally compulsory, even if it were possible; for in that case free self-control, a necessary ingredient of any free state, would be superceded by mechanism." Conversely, the Commission notes that the legal requirements to avoid libel, obscenity, incitement to violence, sedition, and "new categories of abuse" are acceptable because those forms of expression harm individual rights and social needs.[30]

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[24] *See* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927).
[25] SIEBERT ET AL., *supra* note 9, at 81.
[26] COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 121 (Robert D. Leigh ed., 1947).
[27] See, for example, *New York Times v. Sullivan*, 376 U.S. 254 (1964), protecting the right of news organizations to criticize public officials, except with a showing of actual malice.
[28] COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS, *supra* note 25, at 10.
[29] Id. at 120.

Third, collectivists do not agree completely with Milton and Mill's optimistic views on the nature of humanity. As Siebert explains, collectivist theories put "far less confidence in [the rationality of individuals] than libertarian theory, [and they do] seem to deny that [individuals are] innately motivated to search for truth. . . . [People are] viewed not so much as irrational as lethargic.... Consequently, [people are] easy prey for demagogues, advertising pitchmen, and others who would manipulate [them] for their own selfish ends." Rather than nobly seeking out all opinions in a marketplace of ideas, we instead laze about, wanting primarily to "satisfy [our] immediate needs and desires."[31]

These two strands of political philosophy provide distinctive conceptions of the nature of humanity, the source of rights, expectations for the exercise of rights, and the balance between rights and social needs. They also provide the theoretical framework from which the Supreme Court and its individual justices justify protection (or lack thereof) of commercial speech. How that protection is articulated is the topic of the next section.

DEVELOPMENT OF COMMERCIAL SPEECH DOCTRINE

For most of the history of the United States, commercial speech had no protection under the First Amendment. In 1942 the Court held in *Valentine v. Chrestensen*[32] that commercial speech—advertising—did not fall under the protection of the First Amendment. But in 1976 that changed, when in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* the Court "rejected the "highly paternalistic' view that government has complete power to suppress or regulate commercial speech,"[33] and brought "communication which does no more than propose a commercial transaction"[34] under the First Amendment, though that protection was limited. After the decision in *Virginia Pharmacy* the Court spent several terms deciding a number of commercial speech issues on a case-by-case basis,[35] until it outlined a four-part test for when government could regulate commercial speech. First, that test required that the commercial speech in question be for a legal product and not be false or misleading. If it passed that hurdle it fell under the protection of the First Amendment, and regulation designed to curb or ban it had to meet the second, third, and fourth parts of the test: second, the government interest asserted in the regulation had to be substantial; third, the regulation had to advance the asserted government interest directly; fourth, the regulation could be no more extensive than necessary to serve that interest.[36]

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[30] Id. at 10-11.
[31] SIEBERT ET AL., *supra* note 9, at 100.
[32] 316 U.S. 52.
[33] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N. Y.*, 447 U.S. 557, 562 (1980).

At first the *Central Hudson* test, as it has come to be known, seemed a reasonable method for drawing the line between protected and non-protected commercial speech, though it never enjoyed the agreement of all nine sitting justices.[37] In recent years, however, several justices have advocating discarding it, arguing that the test is an artificial and ultimately unworkable method for distinguishing protected commercial speech. Arguments for and against the *Central Hudson* test have centered, ultimately, around the justices' differing conceptions of the definitions and purposes of commercial speech.

Central Hudson: Outlining a Test

Central Hudson involved a New York Public Service Commission regulation banning all advertising promoting uses of electricity. The regulation had initially been issued during the energy crisis of 1973 when the state could not supply enough electricity to meet winter heating demands. Three years later the Commission proposed continuing the ban, even though the energy crisis had ended. The Commission ultimately continued the ban on "promotional advertising," and Central Hudson Gas & Electric Corp., a utility regulated by the state, challenged it, arguing the ban violated the utility's First and Fourteenth Amendment rights of free speech. After outlining its test for protection of commercial speech and finding that the Commission's ban did not meet it, the Supreme Court overturned the ban.

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[34] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* 425 U.S. 748, 776 (Stewart, J., concurring).

[35] *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *Friedman v. Rogers*, 440 U.S. 1 (1979).

[36] 447 U.S. at 566.

[37] Justice Rehnquist dissented in the initial case.

Justice Powell wrote the Court opinion for himself, Chief Justice Burger and justices Stewart, White and Marshall. He noted that earlier commercial speech decisions had accepted a "'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[38] Those 'other varieties' include the right of corporations to speak on political issues.[39] To elevate corporations' speech on public issues was appropriate, but to offer *equal* protection to "speech proposing a commercial transaction" "could invite dilution"[40] of the First Amendment. The expression in this instance did not rise to the definition of speech on public issues, Powell wrote; it was aimed only at promotional advertising "clearly intended to promote sales."[41]

Powell also applied the education function of the media directly to commercial speech. Advertising can be valuable, he noted. In this case, for example, consumers should have access to information about different varieties of energy sources. "[People] will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them."[42] Apparently, however, people would not be able to "perceive their own best interests" if they were subject to deceptive advertising. Specifically, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[43]

The Court ultimately overturned the Commission's regulation in *Central Hudson*, because it failed the third prong of the test—it prohibited promotional advertisements that did not affect energy use and thus was too extensive. The end result protected speech, but in outlining its test the Court opinion carved a middle ground between collective and individualist ideals. On one hand the majority believed people *could* make rational choices; on the other, commercial speech was a social need that could be balanced against other social needs—a clear example of policy as Dworkin defines it.

Three justices concurred in the judgment, offering clear evidence that the *Central Hudson* test would not easily be interpreted or accepted. Justice Blackmun, joined by Justice Brennan, staked out his position clearly: "I concur only in the Court's judgment, however, because I believe the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech."[44] Blackmun was willing to limit constitutional protection of commercial speech when regulations were "designed to protect consumers from misleading or coercive speech"[45] but argued that the Public Utilities Commission was instead withholding information to "manipulate a private economic decision."[46] His disagreement was not with the social interest involved in the case or even with the possibility of balancing speech against the social interest; rather, he opposed the suppression of truthful, or at least nonmisleading, information. Blackmun wanted consumers to have free choice informed by access to information, and in that desire he advocated for the education function of the media. Justice Stevens, also joined by Justice Brennan, went further. The Court's definition of commercial speech—and thus expression that potentially could be regulated—was too broad. The expression here, concerning energy use, was advocacy of a point of view—and thus political, not commercial, speech. Stevens, too, disagreed with the *Central Hudson* test, at least as applied here, though like the others he acknowledged that coercive, deceptive or misleading commercial speech could be banned.

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[38] 447 U.S. at 562.
[39] In *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), decided the same day as *Central Hudson*, the Court concluded that utilities "enjoy the full panoply of First Amendment protection for their direct comments on public issues." 447 U.S. 557, 562 n5.
[40] *Central Hudson*, 447 U.S. at 562 n5.
[41] Id.
[42] Id. at 562 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 770, 1976).

Justice Rehnquist dissented, as he had in *Virginia Pharmacy*. The Court had opened a Pandora's Box in protecting commercial speech, Rehnquist argued, and was beginning to see the alarming results of that decision. Like Stevens, Rehnquist disagreed with the majority's definition of commercial speech, though Rehnquist thought it too narrow: This case made commercial and noncommercial speech "virtually indistinguishable."[47] Rehnquist parted with Stevens in his conclusion, as well. The marketplace of ideas that Stevens had indirectly defended is a logical rationale for protecting *political* speech, but "it has [no context] in the realm of business transactions."[48] In addition, he went further, exposing a key flaw in the underlying rationale for the emerging commercial speech doctrine. If the Court wants to protect commercial speech to promote the free flow of information to consumers so they may make wise economic choices, Rehnquist wondered, why limit that protection to nonmisleading, noncoercive commercial speech? "If the 'commercial speech' is in fact misleading," he wrote, playing Devil's

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[43] Id. at 563.
[44] Id. at 573 (Blackmun, J., concurring).
[45] Id.
[46] Id.
[47] Id. at 591 (Rehnquist, J., dissenting).
[48] Id. at 597.

advocate, "the 'marketplace of ideas' will in time reveal that fact."[49] He did not, of course, believe that the marketplace of ideas would function in that way, in part because he did not share his colleagues' faith in human nature. "Although the Constitution attaches great importance to freedom of speech under the First Amendment so that individuals will be better informed and their thoughts and ideas will be uninhibited, it does not follow that 'people will perceive their own best interests,' or that if they do they will act to promote them."[50] People could not, or would not, use information wisely, and thus society could make choices for them. Here, the Public Utilities Commission could make policy according to its "conception of the public interest,"[51] which in this case included "pressing national and state energy needs."[52] In his dissent, Rehnquist added to the fractured debate on commercial speech doctrine through his collectivist philosophy, treating expression as a policy and questioning libertarian views on human nature.

In *Central Hudson* the Court demonstrated the internal conflict that would continue in its commercial speech doctrine. On one hand, commercial speech is treated as a valued form of expression, one that "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[53] On the other, commercial speech is protected only as long as it adds to public debate, which apparently misleading commercial speech does not do. The Court tried to articulate competing, and ultimately incompatible, visions: Commercial speech is protected so wise people can make rational choices, but misleading commercial speech is not protected because unwise people will be led astray. These visions continued through the next series of cases.

Applying the test: **Metromedia** *to* **Zauderer**

The Court had several opportunities to apply its new test over the next few years, and in the process outlined several of the conflicts that would face the justices throughout the next two decades. The issues of audience versus speaker rights, what constitutes commercial speech, the relative worth of commercial and noncommercial speech, and the abilities of audiences to discern misleading information all faced the Court in these cases.

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[49] Id.
[50] Id. at 593 n5.
[51] Id. at 588.
[52] Id. at 584.
[53] 447 U.S. at 561-2.

In *Metromedia, Inc. v. City of San Diego*,[54] a divided Court overturned a San Diego ordinance that had essentially banned commercial and noncommercial billboards in the city, except those advertising goods and services located at the property where the billboard was situated. The city wanted to avoid the distraction that billboards caused drivers as well as avoid the visual clutter billboards caused. Justice White wrote the plurality decision, and concluded that because the ordinance banned noncommercial billboards while allowing on-site commercial billboards, it failed the third prong of the *Central Hudson* test. Noncommercial—or ideological—speech is more important than commercial, he wrote, quoting Justice Stewart's opinion in *Virginia Pharmacy* and demonstrating the difference between individualist and collectivist thought, because "ideological communication . . . is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man."[55] Commercial speech, on the other hand, is protected because of the "information of potential interest and value conveyed."[56] And while the city "may distinguish between the relative value of different categories of commercial speech,"[57] it could not value commercial over ideological. Justice Brennan, joined by Justice Blackmun, concurred, but based his rationale on the needs of the speaker. In an argument suggesting principle, rather than policy, Brennan noted that the ordinance simply stopped nearly all billboard-based commercial and noncommercial speech. He did not carry that point to its conclusion, however, for he then suggested that a total ban on billboards, given a "sufficiently substantial government interest"[58] would be acceptable. Chief Justice Burger and justices Stevens and Rehnquist dissented, with both Burger and Rehnquist indicating that the social goals here (traffic safety for Burger, aesthetics for Rehnquist) outweighed any interference with commercial expression. Ultimately, in this case commercial speech was viewed clearly as a social interest that was either outweighed by competing social goals or overshadowed by noncommercial speech.

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[54] 453 U.S. 490 (1981).
[55] 453 U.S. at 504 n12 (White, J., plurality opinion)(quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 779-780, 1976).
[56] Id.
[57] Id. at 514.
[58] 453 U.S. at 528 (Brennan, J., concurring).

In re R.M.J.[59] provided the Court's first opportunity to apply its new test to professional advertising. Missouri law precisely governed the manner in which attorneys could advertise. In concluding the state's restrictions were invalid as applied to R.M.J., Justice Powell made a clear argument—for a unanimous Court—that the public was easily misled by professional advertising. Specifically, he wrote, "advertising by the professions poses special risks of deception—because the public lacks sophistication concerning legal services…"[60] In addition, advertising is only protected because of the benefits it provides. So, Powell implied in a policy-based argument, when advertising does not provide benefits it may be regulated.

The next significant commercial speech[61] case also yielded a unanimous result.[62] In overturning a federal law prohibiting unsolicited mailed advertisements for contraceptives, the Court grappled with the definition of commercial speech, setting the stage for future difficulties. The mailings in question were advertisements, but included information on the *issue* of contraception as well, and thus the justices faced the challenge of drawing lines between political speech and commercial speech. For the Court, Justice Marshall quoted *Virginia Pharmacy*—commercial speech "does no more than propose a commercial transaction."[63]—but also suggested that advertising "link[ing] a product to a current public debate"[64] also did not necessarily receive the same protection as noncommercial speech. Marshall concluded that reference to a product, by itself, does not automatically move a message from political speech to commercial; neither does the economic motivation of the speaker, nor even acknowledgment that the message is an advertisement. The combination of those three factors in this case, however, did put the mailings in the realm of commercial speech[65] and thus subjected it to the *Central Hudson* test. Two social interests conflicted here, Marshall wrote: the need for some people to have access to truthful information about contraception and the need for others to keep their mailboxes free from information they might find offensive. In addition, both parties argued that they were upholding the need for parents to teach their children about contraception. By balancing these various social interests—or policies—the Court concluded that the restriction on broad and failed the test. Justice Stevens, who by this time was beginning a move toward fuller protection for commercial speech, concurred, and like Marshall attempted to explain the line between commercial and noncommercial speech. He suggested that the difference was not in economic motivation nor point of view of the speaker, but in the *style*—the "form and context"—of the message.[66] In this explanation is the beginning of a new formulation of commercial speech doctrine, one that would be echoed years later in arguments for a time, place and manner approach.

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[59] 455 U.S. 191 (1982).

[60] Id. at 200 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 383, 1977).

[61] *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). The Court also dealt tangentially with commercial speech in *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489 (1981), which concerned placement and sales of drug-related material.

[62] Justice Brennan did not participate; the vote was 8-0.

[63] 463 U.S. 60, 66 (quoting 425 U.S. at 762).

[64] Id. at 68 (quoting 447 U.S. at 563 n5).

[65] Id. at 67 (internal references omitted).

Limits on the audience: Professionals' advertising

The Court had sketched the contours of professional—lawyers, accountants, and so on—advertising doctrine in *In Re R.M.J.*, and for ten years beginning in 1985 it returned often to the issue of whether professional advertising was somehow more potentially misleading than other types of commercial speech. Taken together, these cases demonstrate a divided Court, not only sparring over the worth of commercial speech in general, but also struggling to find a balance between protecting information for the public, on the one hand, and protecting an "unsophisticated" public on the other.

The education function of the media provided a solid foundation for most of the majority opinions in the professional advertising cases. The truthful, nondeceptive attorney advertising in question in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* was protected, with Justice Brennan writing for the majority that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful information from the false, the helpful from the misleading, and the harmless from the harmful."[67] Brennan repeated those words in his opinion for the Court in *Shapero v. Kentucky Bar Ass'n*,[68] and concluded that the potential for "isolated abuses" in direct-mail solicitations did not warrant a complete ban on that type of commercial speech. In *Edenfield v. Fane* Justice Kennedy, writing for eight of the nine, almost used an individualist argument to tie commercial speech directly into the marketplace of ideas:

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[66] Id. at 84 (Stevens, J., concurring).
[67] 471 U.S. 626, 646 (1985).
[68] 486 U.S. 466 (1988).

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.[69]

Kennedy was not willing to go the next step, however, and place commercial speech on the same level with noncommercial speech. States may regulate commercial speech because of its connection to commercial transactions, he wrote, and that includes ensuring a clean, free flow of commercial information.[70] Justice Blackmun, however, argued against the intermediate standard of scrutiny that Kennedy and earlier cases had outlined. Commercial speech deserved more protection, as long as it was "free from fraud or duress or the advocacy of unlawful activity."[71]

The education function received strong support in another professional advertising case, this one involving an attorney/certified public accountant. Specifically, Florida had not shown evidence that the particular message in question had misled anyone, and the Court concluded that potential harm did not justify the state's ban on truthful information. "[D]isclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information,"[72] wrote Justice Ginsburg for the Court. Furthermore, she noted, giving credit to the public's ability, "we cannot imagine how consumers can be misled by [Ibanez'] truthful representation [that she held a CPA license]."[73]

Throughout these professional advertising cases Justice O'Connor disagreed with most of her colleagues on two key issues. First, she consistently maintained that audiences for professional advertising were ill equipped to understand or resist claims made in those advertisements. In a dissent in *Zauderer*, she, Chief Justice Burger and Justice Rehnquist made it clear that they viewed the recipients of legal advertising as incapable of distinguishing truth from falsehood. There are differences between advertisements for professional services and those for other products, she wrote, and states have "a significant interest in preventing attorneys from using their professional expertise to overpower the will and judgment of laypeople…"[74] It is this view of people—as unable or unwilling to make wise decisions concerning their lives—that characterized all of O'Connor's opinions in the professional advertising cases. For example, dissenting in *Shapero* she argued that *Central Hudson* should apply to *potentially* misleading commercial speech, and that "[u]nsophisticated citizens, understandably intimidated by the courts [and lawyers]" might have trouble with a personalized solicitation.[75] Dissenting in part in *Ibanez* she made a similar argument, suggesting that consumers would not be able to verify the truthfulness of a factual advertisement—some would surely be misled and therefore the advertisement was in fact potentially misleading and could be regulated.[76] Writing for the majority in *Florida Bar v. Went for It*[77] she maintained that people traumatized by some type of accident would be more susceptible to direct mail solicitation by attorneys.

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[69] *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).
[70] Id. at 768.
[71] Id. at 777 (Blackmun, J., concurring).
[72] *Ibanez v. Florida Dep't of Business and Prof'l Regulation*, 512 U.S. 136, 142 (1994) (internal citation omitted).
[73] 512 U.S. at 144.

Second, she concluded that states had an obligation to protect consumers and the legal profession from unprofessional or unethical attorney advertising, a policy-based argument. State regulations "designed to ensure a reliable and ethical profession" should be upheld, she wrote in one dissent.[78] In another she concluded that states should be allowed to regulate professional advertising even if it did no harm to the audience, if it instead "damag[ed] the profession and society at large."[79] In her opinion for the Court in *Florida Bar* she not only held that intermediate scrutiny was acceptable for commercial speech, she also concluded that "[s]tates have a compelling interest in the practice of professions within their boundaries."[80] She drew fire from the four dissenters for that statement, however. "The Court's opinion reflects a new-found and illegitimate confidence that it . . . knows what is best for the Bar and its clients," wrote Justice Kennedy. "Self-assurance has always been the hallmark of a censor."[81]

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[74] *Zauderer*, 471 U.S. at 678 (O'Connor, J., dissenting).
[75] *Shapero*, 486 U.S. at 481-2 (O'Connor, J., dissenting).
[76] *Ibanez*, 512 U.S. at 150-02 (O'Connor, J., dissenting in part).
[77] *Florida Bar v. Went For It*, 515 U.S. 618 (1995).
[78] *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 119 (1990) (O'Connor, J., dissenting).
[79] *Edenfield*, 507 U.S. at 778 (O'Connor, J., dissenting).
[80] *Florida Bar*, 515 U.S. at 625 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 1975).
[81] Id. at 645 (Kennedy, J., dissenting).

Vice advertising and social good: **Posadas, Edge, Coors,** *and* **44 Liquormart**

Concurrent with its decisions on professional advertising, the Court wrestled with the unusual situations arising from advertising for gambling and liquor, which the court termed "vice" products and services. Much of the difficulty surrounded the opposing goals sought in the cases: protection for truthful information for legal products on one hand and concerns about the social and individual ills brought about by those legal products on the other.

Because Puerto Rico wanted to reduce demand for casino gambling among its own citizens, it had banned advertising of those casinos in places where its citizens were likely to see advertisements. In this, the first case dealing with so-called "vice" advertising, Justice Rehnquist concluded for the five-justice majority that the ban met the criteria of the *Central Hudson* test. His argument was straightforward: the Commonwealth had a substantial interest in keeping casino advertising from its citizens, that interest was directly advanced by the ban, and the ban was no more extensive than necessary. Besides, Rehnquist wrote, Puerto Rico could have banned gambling altogether; therefore "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[82] The people of Puerto Rico would be unable to resist the advertising, implied the majority, and the social interest in lessening gambling-related problems far outweighed any social interest in truthful advertising.

Justices Brennan and Stevens authored dissents; each was joined by justices Marshall and Blackmun. Stevens noted the ban's inherent discrimination against Puerto Rican audiences. Brennan directly attacked the concept of incapable audience. Puerto Rico was suppressing speech "in order to deprive consumers of accurate information concerning lawful activity. . . . seek[ing] to manipulate private behavior" and "depriving the public of the information needed to make a free choice."[83] The people should be free to make educated decisions, and regulations restricting speech "for fear that recipients will act on the information provided . . . should be subject to strict judicial scrutiny."[84] Though he only applied his reasoning to nonmisleading speech, Brennan appeared to be suggesting the Court move from the *Central Hudson* test toward a stricter, more traditional First Amendment test such as those applied to noncommercial speech, one that gave more credit to audiences' abilities.

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[82] *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).
[83] Id. at 350-351 (Brennan, J., dissenting).
[84] Id. at 351.

BEST COPY AVAILABLE

The issue of gambling arose again in *United States v. Edge Broadcasting Co.*, regarding a federal law forbidding radio and television stations located in states without legalized lotteries from running advertisements for other states' lotteries. Justice White concluded for the majority that the substantial government interest asserted—supporting policies of non-lottery states—was in fact advanced by the regulation, which provided a reasonable fit between the government interest and the restriction on commercial speech. White went further, however, opening the door for future discussion of appropriate tests for restrictions on commercial speech. Time, place, and manner restrictions are similar to those applied to commercial speech and in fact applicable, he wrote. The time, place, and manner approach "teaches us that we judge the validity of the restriction in this case by the relation it bears to the general problem of accommodating the policies of both lottery and nonlottery States, not by the extent to which it furthers the Government's interest in an individual case."[85] It is possible that here White—who was in this assertion joined by four of his colleagues[86]—was offering the Court a chance to revisit commercial speech doctrine in the future.

The case provoked a sharp dissent by Justice Stevens, joined by Justice Blackmun, who decried the government's attempt to "manipulat[e] public behavior"[87] by banning speech. Tying the present case to *Bigelow v. Virginia*,[88] Stevens wrote, "It is about paternalism, and informational protectionism. It is about one State's interference with its citizens' fundamental constitutional right to travel in a state of enlightenment, not government-induced ignorance."[89] Making a classic education-based argument, Stevens concluded that only a "truly substantial" government interest could justify suppression of truthful information whose purpose was to manipulate, "through ignorance, the consumer choices of some of its citizens."[90] Stevens would continue this line of reasoning in the next two "vice" cases.

Rubin v. Coors, decided two years after *Edge*, involved a 1935 federal act that prohibited beer labels from containing alcohol content information. Justice Thomas wrote for eight of the nine, concluding in a policy- and education-based argument that a free enterprise economy needed a free flow of commercial information "because it informs the numerous private decisions that drive the system."[91] He took the idea one step further when he suggested that commercial information may in fact be of more interest to the average consumer than "interest in the day's most urgent political debate."[92] Using the social interest rationale, taking this statement to its logical conclusion would suggest commercial speech should enjoy a level of protection equal to that of political speech. Thomas declined to go that far at this point. Instead he applied the *Central Hudson* test, concluding that the restriction concerned a substantial government interest (slowing competition among brewers who could use alcohol content as a selling point) but did not advance that interest directly and materially, nor was it sufficiently tailored to the government interest.

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[85] *United States v. Edge Broad. Co.*, 509 U.S. 418, 430-1 (1993).
[86] Justice Souter, joined by Justice Kennedy, concurred, but specifically took "no position" on whether the case should be "reviewed at a more lenient level of generality" 509 U.S. at 436.
[87] 509 U.S. at 436 (Stevens, J., dissenting).
[88] 421 U.S. 809 (1975), in which the Court held that an advertisement for abortion services in New York—where the service was legal—published in a newspaper in Virginia—where the service was not legal—had constitutional protection.
[89] 509 U.S. 418, 439 (Stevens, J., dissenting).
[90] Id.

Justice Stevens concurred in the judgment, picking up where he had left off in *Edge*. This case involved keeping information from consumers "for their own protection," which he argued is unconstitutional in any situation.[93] Truthful information deserved protection, period, though misleading commercial information did not. The reason for commercial speech's lesser constitutional protection was its potential to mislead its audience,[94] he maintained, which had alarming consequences:

> Not only does regulation of inaccurate commercial speech exclude little truthful speech from the market, but false or misleading speech in the commercial realm also lacks the value that sometimes inheres in false or misleading political speech. Transaction-driven speech usually does not touch on a subject of public debate, and thus misleading statements in that context are unlikely to engender the beneficial public discourse that flows from political controversy. Moreover, the consequences of false commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised. Finally, because commercial speech often occurs in the place of sale, consumers may respond to the falsehood before there is time for more speech and considered reflection to minimize the risks of being misled.[95]

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[91] *Rubin v. Coors*, 514 U.S. 476, 481 (1995).
[92] Id. at 482.
[93] Id. at 497 (Stevens, J., concurring).
[94] Id. at 494.
[95] Id. at 496.

This speech in this case was not inaccurate, and thus should not be considered under commercial speech doctrine, Stevens wrote. Additionally, the *Central Hudson* test itself was flawed, because it was not based on the rationale for restricting commercial speech. Instead, this and other content-based restrictions of nonmisleading commercial speech should be subject not to intermediate scrutiny but stringent scrutiny—just like content-based restrictions of noncommercial speech.[96]

Stevens delivered the Court's judgment in the next vice case, though for much of the opinion he mustered only pluralities. *44 Liquormart v. Rhode Island* concerned a state law banning price advertising for alcohol, and all nine justices agreed the law was unconstitutional. Stevens, however, offered two key points highly critical of the Court's developed commercial speech doctrine. First, he made a rational-audience argument favoring protection of truthful speech and in the process declared for himself and three others that *Posadas* had been wrongly decided. Second, he concluded that the current commercial speech doctrine did not adequately protect truthful commercial speech.

In explaining his reasoning concerning the rationality of audiences, he first returned to *Virginia Pharmacy*, in which the Court had acknowledged the importance of advertising to consumer decisions in a free market economy. Truthful information cannot be harmful, he reminded the Court, and bans on it "usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth."[97] Bans on information ostensibly for consumers' "own good"—like the Rhode Island restriction—are particularly dangerous, because they "often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy,"[98] wrote Stevens, arguing for the education function of the media. The better approach to the issue of alcohol consumption would be public discussion, not inhibition of price information. One clear example of this error was the *Posadas* case, decided ten years earlier. The ban on casino advertising in that case "served to shield the State's antigambling policy form the public scrutiny that more direct, nonspeech regulation would draw,"[99] and was wrongly decided.[100] In this Stevens used a "rational audience" argument in two ways. First, audiences should be able to receive truthful information that they will then use in making good economic choices. Second, audiences—the public—should be free to explore the social issues underlying these regulations.

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[96] Id. at 497.
[97] *44 Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996).
[98] Id. at 503.
[99] Id. at 509.
[100] In this Stevens was joined only by justices Thomas, Kennedy, and Ginsburg.

In a section of the opinion joined only by justices Kennedy and Ginsburg, Stevens examined the division between speech accorded less constitutional protection and that given fuller protection. Various opinions in earlier cases had attempted, with limited success, to explain that division. There is no categorically driven level of protection for commercial speech, he wrote, and "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." Complete bans on nonmisleading commercial speech are potentially more harmful even than time, place, and manner restrictions, he wrote, responding to White's point in *Edge*, because they are based on content and leave no viable alternative methods of communication. In addition, neither the Court's earlier use of "commonsense distinctions" between commercial and noncommercial speech nor its rationale for giving less protection to commercial speech (it can be verified and it is 'hardier'[101]) adequately protected truthful commercial speech. In this argument Stevens is staking a position in the developing discussion over granting greater protection to some forms of commercial speech.

There were three concurring opinions in the case, but Justice Thomas' provided the clearest example of the continuing debate over the rationality of audiences and the purposes of commercial speech.[102] Thomas was direct. *Central Hudson* should not be applied in cases involving suppression of truthful information about legal products. In cases such as this, there is no real distinction between commercial and noncommercial speech, he wrote. Looking back to *Virginia Pharmacy*, he noted that that first case protecting commercial speech "sharply rebuffed" the idea that consumers needed protection, that they would make unsound choices if given information.[103] Further criticizing the Court's doctrine, he wrote:

> In case after case following *Virginia Bd. of Pharmacy*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of

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[101] The Court had outlined these reasons in *Virginia Pharmacy*, but clearly Stevens does not agree with them.

[102] For a fuller discussion of Thomas' developing commercial speech philosophy, see David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector*, 35 CREIGHTON L. REV. 485 (2002).

> accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.[104]

Continuing, Thomas suggested that these ideas from earlier decisions, as well as history, led to the conclusion that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."[105] Further, the Court's rationales for treating commercial speech differently cannot justify keeping information from consumers "to thwart what otherwise would be their choices in the marketplace."[106] Just as the government cannot inhibit expression to manipulate political choices, neither can it inhibit commercial expression to manipulate economic choices.

The first four 'vice' cases[107] and the professional advertising cases help set the stage for the Court's most recent attempts to articulate a coherent commercial speech doctrine. Unfortunately that doctrine's conflicted, policy-driven approach both to understandings of human rationality and to the purposes of commercial speech have, at this point made it impossible for the Court to offer a coherent commercial speech doctrine. In the next few years the justices continued to spar over where to draw the line between greater and lesser protection. Some argued the line belonged between commercial and noncommercial speech, others saw it between truthful and misleading commercial speech, while still others concluded there should be no line at all.

Central Hudson *under fire:* Discovery Network *through* Thompson

After the two major series of cases from the mid-1980s through the mid-1990s the Court entered a standoff period on the issue of commercial speech, which centered directly on the justification for commercial speech doctrine and whether commercial speech was protected generally for the consumer or the advertiser. In both areas, the conflict was based on underlying fundamental philosophical differences among the justices that arise from the differences between individualist and collective philosophies.

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[103] *44 Liquormart*, 517 U.S. at 519 (Thomas, J., concurring).
[104] Id. at 520.
[105] Id. at 522.
[106] Id. at 523.

A 6-3 decision overturning a Cincinnati ban on promotional-material newsracks provided clear examples of the Court's challenges in finding the dividing line between commercial and noncommercial speech. The majority opinion, written by Justice Stevens, acknowledged the "difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."[108] For example, Stevens explained, the mere fact that someone paid for space or time for their message did not make it commercial; nor was "speech on a commercial subject" necessarily commercial speech.[109] Yet commercial speech was designated as such because of its content. The clearest definition the Court outlined came from an earlier case: "[T]he proposal of a commercial transaction [is] '*the* test for identifying commercial speech.'"[110]

Stevens also made a clear argument for commercial speech as social interest when he wrote:

> The listener's interest [in commercial speech] is substantial: the consumer's concern for the free flow of commercial speech often may be keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.[111]

In this particular case, the social interest (prettier sidewalks) did not outweigh the commercial speech, though the ban failed largely because it applied to promotional material newsracks but not traditional newspaper newsracks.

Justice Blackmun concurred, focusing specifically on the limitations of *Central Hudson*. *Central Hudson* did not adequately protect truthful commercial speech, he noted, reminding the Court that he had concurred only in the Court's judgment in that case. "[T]here is no reason," he wrote, reiterating his point from the earlier case, "to treat truthful commercial speech as a class that is 'less valuable' than noncommercial speech."[112] In the present case,

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[107] The fifth vice case, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999), will be examined in the next section.

[108] *Cincinnati v. Discovery Network*, 507 U.S. 410, 419 (1993).

[109] Id. at 421.

[110] Id. at 423, quoting *Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 473-474 (emphasis added).

[111] Id. at 421, n17, quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (internal citations omitted).

[112] Id. at 431 (Blackmun, J., concurring).

the Court as a whole was facing an unworkable, artificial distinction between commercial and noncommercial speech, one whose foundation was laid in *Central Hudson*. And, Blackmun wrote, "In this case, *Central Hudson's* chickens have come home to roost."[113] Finally, he ended his concurrence with a call to abandon *Central Hudson* "entirely in favor of [an analysis] that affords full protection for truthful, noncoercive commercial speech about lawful activities."[114]

The Chief Justice disagreed. In a dissent joined by justices White and Thomas, Rehnquist narrowed in on the key problem of the Court's long-term approach to commercial speech doctrine. Offering protection—however limited—to this type of speech created "an inherent danger that conferring equal status upon commercial speech will erode the First Amendment protection accorded noncommercial speech…"[115] While Rehnquist would deny any constitutional protection to commercial speech, he was attempting to arrive at a coherent principle, this one informed by collectivist philosophy. Commercial speech is—or can be—a social good, and as long as it provides good it is desirable. But to equate it with higher-level individual speech that is intrinsically valuable is a mistake, Rehnquist argued. And certainly he disagreed with the "halfway" method the Court had adopted to this point, a method that effectively applied neither policy nor principle to the concept of commercial speech.

Rehnquist and Thomas, along with Justice Scalia, joined a dissent authored by Justice Souter in the next case to demonstrate the conflict. In *Glickman v. Wileman Bros.*[116] the majority held that fees assessed to fruit growers that were used to promote fruit consumption in general were an economic, not speech, regulation. Souter, and the others offered several new points to the debate on commercial speech. [117]

First, they extended the rationale for the protection of commercial speech. Earlier cases consistently had extolled the need for consumers to have access to truthful, factual information. Here, though they acknowledged the importance of "truthful representation of the product," the dissenters went further. "[A]ll the symbolic and emotional techniques of any modern ad campaign"[118] are also important, they suggested. Persuasive expression—even in the commercial context—is "an essential ingredient of the competition….[and] the rhetoric of advertising cannot be written off as devoid of value or beyond protection, any more than can its power to inform."[119] What the four did not make clear, however, was the point at which persuasive speech becomes misleading and consequently loses its protection. Nevertheless, this marked the first time any justice had specifically advocated protecting *persuasive*—as opposed to strictly factual or truthful—commercial speech because of its value to society. Second, the group concluded that commercial speech was protected not only because of the consumers' right to *receive* information but also because of the advertiser's right to *send* it. For the first time a cluster of justices wanted to protect commercial speech not as a policy serving a social goal, but as a principle: the advertiser's right to "[tout] his wares as he sees fit, so long as he does not mislead."[120] The consumer's interest, while still paramount, is not "the exclusive touchstone of commercial speech protection."[121] The dissenters relied on an argument Glickman had made (though the majority had ignored it because they did not view this as a speech case), in which he had maintained that the compelled subsidies were desirable because they increased the total amount of truthful information available to the consumer. This was an admirable goal, Souter and the others agreed, but so is protecting "the advertiser's own choice of what to promote."[122] This was a remarkable shift in rationale, at least for the commercial speech cases, and provided a justification on speaker, rather than audience, rights.

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[113] Id. at 436.
[114] Id. at 438.
[115] Id. at 439 (Rehnquist, C.J., dissenting).
[116] 521 U.S. 457 (1997).
[117] Justice Thomas did not join one part of the dissent, in which the rest applied the *Central Hudson* test to the regulation. In addition, he authored his own dissent, in which he argued against the *Central Hudson* test, and the "discounted weight given to commercial speech generally" 521 U.S. at 504 (Thomas, J., dissenting).

The majority sidestepped the growing unrest about the *Central Hudson* test in the fifth "vice advertising" case, *Greater New Orleans Broadcasting Ass'n v. United States.*[123] In this case the *Central Hudson* test was used to overturn a federal statute forbidding broadcasters from airing advertisements for for-profit casinos. Justice Stevens, writing for everyone but Justice Thomas, noted that because the *Central Hudson* test was sufficient to overturn this particular statute, there was no need to consider whether commercial speech deserved a higher level of protection: "[W]e do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground. In this case, there is no need to break new ground."[124] Stevens also attempted to smooth over differences, writing that "reasonable judges may disagree about the merits of

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[118] *Glickman*, 521 U.S. at 479 (Souter, J., dissenting).
[119] Id. at 480.
[120] Id. at 488.
[121] Id. at 479.
[122] Id. at 490.
[123] 527 U.S. 173 (1999).
[124] Id. at 184 (internal citation omitted).

[proposals such as *Central Hudson*]."[125] Justice Thomas was unwilling to agree, however. Concurring only in the judgment, he again argued for abandoning *Central Hudson* because of its use in "manipulat[ing consumers'] choices in the marketplace"[126] For Thomas, at any rate, consumers should have access to information to make their own rational decisions.

Thomas clearly articulated his point in the next major case, *Lorillard Tobacco Co. v. Reilly.*[127] Justice O'Connor delivered the Court judgment in this case, in which several Massachusetts regulations of outdoor and point-of-sale tobacco advertisements were held unconstitutional. O'Connor noted that the tobacco company and some members of the Court had suggested *Central Hudson* be replaced with strict scrutiny; but, she wrote, there was no need to do so. Justices Kennedy and Scalia joined in a concurring opinion expressing their concern that *Central Hudson* did not adequately protect truthful, nonmisleading commercial speech. Thus it was left to Thomas to articulate a stronger standard for commercial speech, which he did with two arguments.

First, the *Central Hudson* test should be abandoned in favor of a strict scrutiny approach. The reasons the Court gave initially for allowing restrictions on commercial speech—it is "'more easily verifiable by its disseminator' and less likely to be 'chilled by proper regulation'"—applied only to "the risk of deceptive or misleading advertising."[128] Regulations whose purpose is to restrain truthful *commercial* information are no different than regulations that restrain truthful *noncommercial* information, Thomas maintained. In addition, the regulations at issue here were aimed directly at the content of the messages (which advertised tobacco products), and "[w]e have consistently applied strict scrutiny to such content-based regulations of speech."[129] These regulations failed the strict scrutiny test, which requires that they be "narrowly tailored to promote a compelling government interest" and that there be no "alternative that is less restrictive of speech."[130] Thus, here, Thomas clearly advocated more stringent protection for truthful commercial speech.

His second argument touched on a rights- or principle-based rationale for protecting commercial speech. First, he attacked the logic behind separating commercial from noncommercial speech. "I doubt whether it is even possible to draw a coherent distinction between" the two,[131] thus they may have to be treated equally. Second, he challenged the weight given the government's interest in the case. While the state may have a social interest in keeping tobacco advertising from young people, he wrote, "it may not pursue that interest at the expense of the free speech rights of adults."[132] It is unclear here what adults he was referring to, those presenting the information or those receiving it. Nevertheless, this is one of the few times any justice acknowledged free speech rights—principles—rather than social goals—policies—in a commercial speech case. Finally, he made a clear argument for the rights of speakers to advocate harmful ideas or products, and directly ties protection of commercial speech to the rights of anyone to speak:

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[125] Id.
[126] Id. at 197 (Thomas, J., concurring).
[127] 533 U.S. 525 (2001).
[128] 533 U.S. at 578 (Thomas, J., concurring in judgment).
[129] Id. at 572.
[130] Id. at 581.

> No legislature has ever sought to restrict speech about an activity it regarded as harmless and inoffensive. Calls for limits on expression always are made when the specter of some threatened harm is looming. The identity of the harm may vary. People will be inspired by totalitarian dogmas and subvert the Republic. They will be inflamed by racial demagoguery and embrace hatred and bigotry. Or they will be enticed by cigarette advertisements and choose to smoke, risking disease. It is therefore no answer for the State to say that the makers of cigarettes are doing harm: perhaps they are. But in that respect they are no different from the purveyors of other harmful products, or the advocates of harmful ideas. When the State seeks to silence them, they are all entitled to the protection of the First Amendment.[133]

Those who produce and advertise tobacco have as much right to speak as those who advocate other disfavored topics. Though society may have legitimate, even necessary, interest in silencing them, they should be protected, Thomas maintained. For him, anyway, a coherent commercial speech doctrine meant the principle outweighs the policy.

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[131] Id. at 575.
[132] Id. at 579.
[133] Id. at 583.

The two most recent cases decided by the full Court, both from 2002,[134] mark a return to conflict over the fundamental approach to protection of commercial speech. In *United States v. United Foods,*[135] the Court again was faced with compelled subsidies for advertising produce. For the Court, Justice Kennedy distinguished this case from *Glickman,* because here a mushroom producer not only disagreed with the subsidies themselves, it also disagreed with the message within the advertisements. The majority of six concluded that the regulations here did not meet even the *Central Hudson* test, so there was no need to discuss whether it should be abandoned. Justice Thomas concurred in the Court opinion and offered a separate opinion as well, making his strict scrutiny argument again. Justice Breyer, joined by Justice Ginsburg,[136] dissented. In what may have been a direct response to Thomas' words in *Lorillard*, he reminded his colleagues that "[w]hen purely commercial speech is at issue, the Court has described the First Amendment's basic objective as protection of the consumer's interest in the free flow of truthful commercial information."[137] This regulation does that, Breyer suggested in a clear social policy argument based on the education function, because it provides truthful information to consumers. Furthermore, the precedent set here could significantly harm social interests, for it could be used, for example, to overturn requirements that "tobacco companies…contribute to an industry fund for advertising the harms of smoking…"[138] Requiring more speech would be acceptable, even laudable, Breyer implied, if it assisted in larger social goals.

The Court majority once again acknowledged, but refused to confront, questions about *Central Hudson* and the underlying conflict in its approach to commercial speech doctrine in *Thompson v. Western States Medical Center.*[139] The case involved an FDA ban on pharmacist advertising of tailor-made, or compounded, drugs, a ban that the Court agreed did not meet the minimum standards of *Central Hudson.* Earlier cases recognized the value of a free flow of commercial information to the public, Justice O'Connor wrote for the majority, and this case should be no different. If given access to truthful information, "people will perceive their own best interests"[140] and not "irrationally to the truth."[141] Justice Thomas concurred, continuing his lone argument for strict scrutiny and against *Central Hudson.*

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[134] In *Nike v. Kasky*, 2003 U.S. Lexis 5015 (2003) the Supreme Court dismissed its previously granted writ of certiorari as improvidently granted. This case had the potential for providing the Court the opportunity to clarify its commercial speech doctrine, particularly as it relates to the gray areas between traditional commercial speech and corporate speech on public issues. In his dissent from the dismissal, Justice Breyer (joined by Justice O'Connor) concluded that Nike's was a 'mixture' of commercial and noncommercial speech. Because of that combination, Breyer suggested that Nike's speech, in which the sportswear company defended itself against allegations of unfair labor practices, deserved the heightened scrutiny usually reserved for noncommercial speech. He then maintained that heightened scrutiny would require the protection of Nike's right to speak.

[135] 533 U.S. 405 (2002).

[136] He was also joined in pertinent part by Justice O'Connor, but she did not join the section of Breyer's dissent discussed here.

[137] *United Foods*, 533 U.S. at 426 (Breyer, J., dissenting).

[138] Id. at 428.

Justice Breyer, however, joined by the Chief Justice and justices Stevens and Ginsburg, did confront the issue of principles and policies, rights and social goals. Dissenting, Breyer dismissed the idea that commercial speech should be equated with noncommercial, or ideological, individual speech. "[R]estrictions on commercial speech do not often repress individual self-expression,"[142] and thus are not based on principles or individual rights. Those restrictions also typically do not interfere with other crucial social goals, he wrote, such as "the functioning of democratic political processes…"[143] and in fact they serve social goals like "public health, individual safety, or the environment."[144] Commercial speech is not the same as noncommercial speech, he maintained, and to treat it as such "will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections."[145] Very clearly, to these four, truthful commercial speech fulfills the requirements of a social need. The most recent half-decade of cases, then, demonstrates that the Court is no closer to—and is perhaps further from—consensus on how to treat commercial speech.

CONCLUSION

In the more than 20 years since its first attempt to create a coherent commercial speech doctrine, the Court has lurched along, offering generally greater protection to commercial speech but unable successfully to justify that protection. Four general areas of disagreement were evident in the various cases: the definition of commercial speech, the purposes of protecting it, the abilities of its audiences, and the location of the protection (with speakers

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[139] 535 U.S. 357; 152 L.Ed. 2d 563 (2002).
[140] 152 L.Ed. 2d at 578 (Quoting *Virginia State Bd. of Pharmacy*, 425 U.S. 748, 770)
[141] Id. at 579 (Quoting *44 Liquormart*, 517 U.S. 484, 503).
[142] 152 L.Ed. 2d at 586-7 (Breyer, J., dissenting).
[143] Id. at 587.
[144] Id.
[145] Id.

or audiences). In the end, each of those disagreements resulted from a conflict of philosophies and whether the justices approached commercial speech doctrine from an individualist or a collectivist perspective.

Concerning the definition of commercial speech, while the Court often presented definitions, those were conflicting and confusing, and the justices could not agree on what characteristics made a message commercial. When commercial speech came close to political speech, or included discussion of public issues, some justices began to make rights-based arguments. Those seldom went far. Instead, most discussion clearly demonstrated that though the Court could not quite agree on a definition, most could agree that commercial speech is less worthy of protection than ideological speech. Justice Thomas' later opinions provided a possible exception. Over all, the Court's discussions of the definition of commercial speech established that it sees that type of expression as a social goal, not an individual right.

In their dialogue on the purposes of protecting commercial speech, the justices also used policy-based, social goal arguments. Commercial speech was protected because it provided audiences with truthful information on which to make intelligent decisions. Again, the Court primarily offered collectivist rationales. Commercial speech that did not fulfill that goal—if it was deceptive, for example—could be regulated or banned.

The justices also differed on the rationality of audiences for commercial speech. Debate in the professional and vice advertising cases suggested that a number of the justices thought the audiences for those types of speech, anyway, were unable to discern misleading information from factual. Audiences were, in one case, "unsophisticated." And even in cases protecting other types of commercial speech, the Court used rational-audience arguments only to protect truthful speech, which is not a really a rational-audience argument at all. No one, with the possible exception of Justice Thomas, was willing to take a libertarian stand to suggest that audiences could in fact tell truth from falsehood in commercial speech, just as they supposedly could in ideological speech. Chief Justice Rehnquist acknowledged the Court's lack of logic when he facetiously suggested that if the Court wanted to protect commercial speech it needed to protect *all* commercial speech.

There was limited discussion over whose rights were protected in commercial speech doctrine, likely because the Court ultimately did not see commercial speech as a right at all. Much was made of audiences' need for information, but only twice did the concept of the speaker's right surface—in Justice Brennan's comment that a San

Diego billboard ban stopped billboard-based speech,[146] and in Justice Thomas' call to protect the right to speak about harmful ideas or products.[147]

Over the two decades, Chief Justice Rehnquist and Justice Thomas came closest to outlining logical positions, Rehnquist for collectivism and Thomas for individualism. But neither could convince his colleagues to join him. Other than those two, the justices have been unable to articulate a coherent commercial speech doctrine, because they view the benefits of commercial speech as a social goal—a collectivist position—but attempt to protect commercial speech using a rights-based, individualistic constitutional argument. Commercial speech is defended through policy, but the First Amendment protects rights. Ultimately, the Court cannot effectively use the First Amendment to protect commercial speech because of the Court's approach. The Court needs to choose either to return to pre-*Virginia Pharmacy* days and allow regulation of commercial speech so it benefits society, or to protect the rights of individuals and companies to "tout their wares as they see fit" at the same level that political speech is protected. Until it does so, the inevitable incoherence of the Court's position on commercial speech doctrine will continue.

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[146] *Metromedia, Inc., v. City of San Diego*, 453 U.S. 490 (1981)(Brennan, J., concurring).
[147] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)(Thomas, J., concurring in judgment).

CAN THE EFFECT OF *RICHMOND NEWSPAPERS* STRETCH EVEN FURTHER? AN ANALYSIS OF THE RIGHT OF THE PRESS TO COVER IMMIGRATION HEARINGS

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Can the Effect of *Richmond Newspapers* Stretch Even Further?

An Analysis of the Right of the Press to Cover Immigration Hearings

On December 19, 2001, a Michigan immigration judge held a bond hearing to determine whether Rabih Haddad should be deported.[1] Haddad had stayed beyond the time limit specified by his tourist visa and thus was subject to deportation. Additionally, the United States Justice Department suspected Haddad's Islamic charity had supplied funds for terrorist organizations.

Due to Haddad's suspected connection with the Al Qaeda terrorist network, the case created press interest. Members of Haddad's family and the public, as well as press representatives, attempted to attend the hearing. However, security officials refused them entry, announcing that the quasi-judicial administrative hearing had been designated a special interest case and, therefore, was closed to the press and public. The closing of the Haddad hearing provided an early demonstration of Chief Immigration Judge Michael Creppy's directive (hereinafter "the Creppy memo") ordering the blanket closure of all hearings for "special interest" cases.[2]

Several media organizations, Haddad family members, and other members of the public sued United States Attorney General John Ashcroft in *Detroit Free Press v. Ashcroft*[3], arguing that both governmental regulations[4] and the U.S. Constitution required the hearing to be open to both the public and the press.[5] The plaintiffs also requested that the Creppy memo be declared unconstitutional, that all future deportation hearing closures be enjoined, and that transcripts of previous hearings be released. The Department of Justice argued that both national security concerns and the government's plenary powers over immigration procedures provided constitutional justification for the hearing's closure. U. S. District Court Judge Nancy G. Edmunds decided in favor of the plaintiffs, citing the First Amendment right of access established in *Richmond Newspapers, Inc. v. Virginia*[6] and clarified in subsequent cases.[7]

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[1] For background on the Haddad case, see *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).
[2] The Creppy memo defines special interest cases as those during which sensitive or national security information may be presented.
[3] Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 948 (E.D. Mich. 2002).
[4] *See* 8 C.F.R. § 3.27 (2002).
[5] *Detroit Free Press*, 303 F.3d at 684.

The government's appeal of the Michigan decision to the Sixth Circuit Court of Appeals yielded a similar ruling. The appeals court acknowledged the government's clear authority to guard the nation's borders through immigration laws. However, the court said the public constituted the "only safeguard against this extraordinary power" through the press.[8] The court refused to issue a stay of the lower court order to release the transcripts pending appeal, and the government later voluntarily released the transcript.[9]

A similar case in New Jersey[10] yielded a similar result. U. S. District Court Judge John W. Bissell granted an injunction preventing the closing of an Immigration and Naturalization Service deportation hearing, relying extensively on *Richmond Newspapers* and its progeny. The U. S. Justice Department appealed *North Jersey Media Group v. Ashcroft* to the Third Circuit Court of Appeals, and secured a stay of implementation of the district court decision from the U.S. Supreme Court.[11] On October 8, 2002, the Third Circuit announced its decision, reversing the district court and ruling in favor of the government.[12] Significantly, the circuit court applied the two-part *Richmond Newspapers* test[13] as the controlling precedent but ruled that the district

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[6] 448 U.S. 555 (1980).

[7] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press Enterprise II).

[8] *See Detroit Free Press* 303 F.3d at 683.

[9] Ashley Gauthier, *Feds Release Transcripts of Immigration Hearings: White House Vows to Fight Disclosure in Future Trials*, THE NEWS MEDIA & THE LAW, Spring 2002, at 47.

[10] North Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, (D.N.J. 2002).

[11] Ashcroft v. North Jersey Media Group, Inc., 122 S.Ct. 2655, (2002).

[12] North Jersey Media Group, Inc. v. Ashcroft, 2002 U.S.App. LEXIS 21032 (3rd Cir. Oct. 8, 2002).

[13] In the majority opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), Chief Justice Warren Burger found a limited First Amendment right of public access to criminal trials due to the long history of openness

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court erred when it found the North Jersey Group's arguments satisfied both the experience and logic tests.[14]

While courts have generally found no inherent First Amendment right of access for the public and press to "information within the government's control,"[15] the *Richmond Newspapers* decision clearly established an exception by finding a First Amendment right to attend criminal trials.[16] This doctrine was extended to other proceedings through subsequent cases.[17]

The conflicting decisions from the Third and Sixth Circuits clearly demonstrate the lack of agreement on the extent of the reach of the *Richmond Newspapers* decision. The losers in the *North Jersey Media Group* case appealed the decision to the U. S. Supreme Court, and the outcome of that appeal was closely watched due to its potential long-range impact. On May 27, 2003 the Court announced a denial of certiorari for the *North Jersey Media Group* case. No reason for the denial was given.

Some contend that a Court decision restricting access to deportation hearings might have created a precedent that could be used to close criminal trials.[18] Such a decision would constitute the first major departure from the *Richmond Newspapers* doctrine. The Justice Department

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of such trials. In a concurring opinion, Justice Brennan focused on the benefits to society that accrued as a result of openness. After this decision, a trial court was required to apply the *Richmond Newspapers* test to determine whether the First Amendment right of access applied to the proceeding at issue. If so, the closure must then be justified by a compelling interest. The details and findings of the *Richmond Newspapers* decision are examined in detail *infra* pp. 10-11.

[14] *See infra* pp. 9-10.

[15] *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978). ("[N]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control"); Branzburg v. Hayes, 408 U.S. 665, 684 (1972). ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally").

[16] In *Richmond Newspapers*, Chief Justice Burger stated that absent an "overriding interest articulated in findings," the First and Fourteenth Amendments require criminal judicial proceedings to be open to the press and public (448 U.S. at 556).

[17] *See* United States v. Criden, 675 F.2d 550, 554 (3d Cir. 1982) (attendance at pretrial suppression hearings); Publicker Industries, Inc. v. Cohen, 733 F.2d. 1033 (3d Cir. 1984) (extending First Amendment rights of access to civil proceedings); Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569, 574 (D. Utah 1985) (applying *Richmond Newspapers* standard to an administrative hearing).

[18] *See, e.g., Detroit, Ann Arbor Papers Sue INS, Asking for Access to Immigration Hearings,* AP, Jan. 29 2002, LEXIS, Nexis Academic, News Library; David Ashenfelter & Niraj Warikoo, *Secrecy Opposed in Activist's Case,* DETROIT FREE PRESS, Oct. 3, 2002, LEXIS, Nexis News Library, KR-ACC-NO: K5045.

argues equally forcefully that open proceedings unconstitutionally limits the government's plenary control of immigration, as well as compromise national security and the fight against terrorism.

Though the Court declined to hear the case, the importance of this argument remains potentially vast. Ironically, If the access established under *Richmond Newspapers* is applicable, the Bush Administration's order for a blanket closure of immigration hearings would probably have been found unconstitutional. Such a finding could have prompted a major change in administration plans for the trial of detained non-citizens. If decided broadly enough, it would have cemented the concept of public access to trials and justified the extension of that access to other proceedings. If the Supreme Court had upheld the government's right to close the hearings, however, the ruling might have offered an opportunity to withdraw some of the limited rights of access recognized by lower courts under *Richmond Newspapers.*[19] Thus, the Court's refusal to decide the case might benefit future openness. Some media groups were so concerned they took preliminary steps designed to prevent any potential loss of rights.[20] The Supreme Court's refusal to hear the *North Jersey Media Group* case did nothing to clarify the extent of access rights established under *Richmond Newspapers* and its progeny. It let stand without comment the Third Circuit Court of Appeals' ruling in favor of government closure. Since the Sixth Circuit Court of Appeals' ruling was not appealed, that ruling continues to stand as well. The purpose of this paper is to analyze the applicability of the right of access established in *Richmond Newspapers* and its progeny to the issues raised by the *Detroit Free Press* and *North Jersey Media Group* cases in an effort to determine which U. S. Circuit Court of Appeals was more in line with the Supreme Court's previous decisions.

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[19] For a brief discussion of this issue, see James C. Goodale, *Does Freedom Die Behind Closed Doors?* N.Y.L.J., Oct. 4, 2002, at 3.

[20] Several major news organizations have initiated an amicus campaign to attempt to protect the rights established under *Richmond Newspapers. See* Jim Edwards, *News Media Mount Amicus Campaign to Preserve Right of Access to Trials*, N.J.L.J., July 22, 2002, at 4.

REVIEW OF LITERATURE

While a significant body of literature examines public access rights under *Richmond Newspapers* and its progeny,[21] little has been written on the application of this right to quasi-judicial administrative proceedings such as deportation hearings conducted by the Immigration and Naturalization Service. A *Harvard Law Review* article reported and briefly analyzed the differences between the Third and Sixth Circuit Court rulings. The article concluded that the main difference between the two court opinions rested on "the manipulability of historical traditions."[22] The article said the Third Circuit Court saw a long history of openness as a "rigid requirement," while the Sixth Circuit Court did not allow "historical silence by itself to defeat a right of access claim."[23]

A special section in *News Media & the Law* examined "trends toward court secrecy, and what can be done to challenge it [sic]."[24] In one of six sections, the report discussed immigration proceedings, including brief descriptions of immigration laws, the use of secret evidence, a description of the Terrorist Removal Court, and access to immigration proceedings. Because it was written prior to both the issuance of new rules governing deportation proceedings in May

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[21] *See, e.g.*, Leon Ruchelsman & Mark Kagan, *Closing the Courtroom: Trends and Concerns*, N.Y.L.J., Dec. 5, 2001, at 1 (discussion of courtroom closures when cases feature undercover drug agents as witnesses); Sean D. Corey & Sarah A. Stauffer, *Twenty-Eighth Annual Review of Criminal Procedure: Sixth Amendment on Trial*, 87 GEO.L.J. 1641 (1999) (examines conflict between defendant's right to waive Sixth Amendment right of public trial and First Amendment right of access); Jeanne L. Nowaczewski, *The First Amendment Right of Access to Civil Trials After* Globe Newspaper Co. v. Superior Court, 51 U. CHICAGO L. R. 286 (1984) (constitutional right of access announced in *Richmond* and *Globe* extends to civil trials); Beth Hornbuckle Fleming, *First Amendment Right of Access to Pretrial Proceedings in Criminal Cases*, 32 EMORY L.J. 619 (1983) (individual case circumstances may justify closure of pre-trial proceedings; secrecy of grand jury proceedings unlikely to be affected by court decisions on press access).

[22] *Recent Case: First Amendment-Public Access to Deportation Hearings-Third Circuit Holds That the Government Can Close "Special Interest" Deportation Hearings*, 116 HARV. L. REV. (2003), at 1200.

[23] *Id.*

[24] Ashley Gauthier, *Secret Justice: Access to Terrorism Proceedings*, NEWS MEDIA & THE LAW, Winter 2002, at S1.

2002 and the decisions in the *Detroit Free Press* and *North Jersey Media Group*, it does not include many recent developments in the continuing dispute over access. However, Ashley Gauthier continues to write consistently on the issue, though the reports are in the form of legal journalism and do not attempt in-depth analysis.[25]

While not discussing public and press access, a small body of literature examined the secrecy of the record of immigration proceedings, particularly access to evidence used to support deportation. Kelly Brooke Snyder,[26] David Cole,[27] and D. Mark Jackson[28] examined the problems and implications of the use of secret evidence in deportation proceedings. In such proceedings, the government uses classified evidence to support deportation without allowing the alien to view it. The evidence is examined by the judge in chambers, and a summary is prepared by the prosecution that is intended to allow the defendant to prepare a defense.[29] The action is justified on national security grounds. Snyder examined the use of secret evidence in cases decided prior to the September 11th attacks and found immigration judges assigned lower significance to governmental national security arguments in those earlier cases.[30] She said the September 11th attacks would probably result in immigration judges giving greater credence to government national security arguments and a return to World War II era attitudes that personal liberties should be subordinated to national security concerns.[31] She argued that the Executive

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[25] *See, e.g.*, Ashley Gauthier, *Feds Release Transcripts of Immigration Hearings*, NEWS MEDIA & THE LAW, Spring 2002, at 47; *Judge Opens Access to Terrorism Proceedings, But U.S. Supreme Court Issues Stay of Order*, NEWS MEDIA & THE LAW, Summer 2002, at 46; *Proposed INS Rule Would Seal Files, Close Immigration Courts*, NEWS MEDIA & THE LAW, Summer 2002, at 46.

[26] Kelly Brooke Snyder, *A Clash of Values: Classified Information in Administrative Proceedings*, 88 VA. L. REV. 447 (2002).

[27] David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267 (2000/2001).

[28] D. Mark Jackson, *Exposing Secret Evidence: Eliminating a New Hardship of United States Immigration Policy*, 19 BUFF. PUB. INT .L.J. 25 (2001/2002).

[29] *Id.* at 37.

[30] Snyder, *supra* note 24, at 456.

[31] *Id.* at 474.

Branch should have broad authority to control the admission of secret evidence into immigration hearings, subject to subsequent judicial review.[32]

Cole described his experiences as a lawyer involved in defending aliens in deportation proceedings. He agreed with Jackson that the use of secret evidence was always unconstitutional. Cole said the use of secret evidence strikes at the heart of the United States' adversarial justice system.[33] In a later article, Cole briefly noted that civil rights protections and procedures in deportation hearings were different than those used in traditional trials.[34] His article did not mention press access rights, however.

Jackson argued that the use of secret evidence is unconstitutional in three ways. First, the use of secret evidence derives from an improper and inaccurate analysis of congressional powers to regulate immigration. Second, the use of secret evidence violates the Due Process Clause of the Fifth Amendment.[35] Third, the use of secret evidence violates the Confrontation Clause[36] of the Sixth Amendment.[37]

Most of the literature that discusses administrative proceedings deals with military tribunals which, like deportation hearings, are quasi-judicial proceedings under the control of the Executive Branch. On November 13, 2001, the Bush Administration announced its intention to use the tribunals to try non-U.S. citizens for violations of the "laws of war" in the war on terrorism.[38] However, little of this literature considers public access to the tribunals.

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[32] *Id.* at 450.

[33] Cole, *supra* note 25, at 276.

[34] David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

[35] The Due Process Clause specifies that no person "shall be deprived of life, liberty, or property without due process of law" (U.S. CONST. amend. V).

[36] The Confrontation Clause specifies that in any judicial proceeding, the accused has the right to be confronted with the witnesses against him (U.S. CONST. amend. VI).

[37] Jackson, *supra* note 27, at 42-43.

[38] *See* George Lardner, Jr. & Peter Slevin, *Military May Try Terrorism Cases; Bush Cites 'Emergency,'* WASH. POST, Nov. 14, 2001, at A1.

Perhaps the most closely related work in this area was prepared by the Association of the Bar of the City of New York, though it primarily limited its discussion to press coverage of military tribunals and examined the issue of open immigration hearings only peripherally. The Association document first traced the history of tribunals and examined the level of press coverage permitted in each.[39] The Association document also described in detail the rights of the press to attend civilian court proceedings under *Richmond Newspapers,* as well as detailing similar case law under the military justice system.[40] The Association argued that both U.S. Supreme Court and Court of Military Justice precedents require military tribunals to be open to the press and public.

Tom Perrotta described a panel discussion sponsored by the Association of the Bar of New York City on press coverage of military tribunals.[41] The group included a former U.S. Attorney, a federal district court judge, a legal educator, and a *New York Times* columnist. It concluded that while it was unlikely that strong legal precedent could be found to argue for press access to the tribunals, if the government wanted to demonstrate that the proceedings were fair, it would be wise to make them as open as possible.[42]

While these articles discussed the use of classified evidence at immigration hearings extensively, they did not deal specifically with the issue of press access either to the hearings themselves or to transcripts and evidence. Indeed, the literature review found no articles providing systematic analysis of the legal basis for a First Amendment right of press coverage of

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[39] Committee on Communications and Media Law, The Association of the Bar of the City of New York, *The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper,* 57 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 94 (2001/2002).

[40] *Id.* at 126. The Association position paper cites *United States v. Hershey,* 20 M.J. 433 (C.M.A. 1985), as the primary case providing press access rights during court martial proceedings. The appeals court in this case applied the *Richmond Newspapers* case as a precedent in finding that the press and public not only must have access to the court martial, but, also, must be allowed onto the military base where the court martial inevitably would be held.

[41] Tom Perotta, *Press Access to Tribunals is Debated,* N.Y.L. J., Feb. 28, 2002, at 1.

[42] *Id.*

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immigration/deportation hearings such as provided in judicial trials under *Richmond Newspapers*.

RESEARCH QUESTIONS/LIMITATIONS

This paper proposes to answer the following research questions:

1. Does the First Amendment provide a right to attend and cover quasi-judicial immigration proceedings held under the authority of the Executive Branch that is substantially similar to the right to attend judicial proceedings established in *Richmond Newspapers* and its progeny?
2. Are the national security objections proposed by the Department of Justice as justification for secret proceedings strong enough to overcome this right of access, if it exists?

This paper will first provide a description and analysis of press access rights as established by *Richmond Newspapers* and its progeny. It will then analyze and compare the district court rulings in *Detroit Free Press* and *North Jersey Media Group*, particularly as the tests in the *Richmond Newspapers* family of cases were applied. It will then similarly analyze and compare the conflicting decisions of the Sixth and Third Circuits. Finally, it will summarize the findings and reach conclusions in answer to the above research questions.

The U.S. Constitution vests in Congress the authority to regulate immigration through the establishment of "an [sic] uniform rule of naturalization."[43] Scholars have not questioned the constitutionality of the immigration proceedings themselves, though such procedures as the use of secret evidence have drawn considerable criticism. Thus, this paper will assume that the Immigration and Naturalization Service is acting under proper legal authority when it convenes deportation hearings. It is also outside the scope of this paper to examine press coverage of other administrative proceedings such as the proposed military tribunals, Social Security hearings, etc. Such an undertaking would require a manuscript of several volumes.

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[43] U.S. CONST. art. I, § 8.

RICHMOND NEWSPAPERS AND ITS PROGENY

The United States Supreme Court used four cases over a six-year period to establish a constitutional right of access for the press and public to a variety of criminal proceedings. Beginning in 1980 with the decision in *Richmond Newspapers, Inc. v. Virginia*, and ending with *Press-Enterprise v. Riverside County Superior Court* in 1986, the Court established a limited First Amendment right of access for the press and public to criminal trials, sexual offense trials involving victims under age 18, voir dire proceedings,[44] and preliminary hearings. In the four cases, the Court consistently held that criminal proceedings are presumed to be open unless a compelling interest can be demonstrated through findings of fact. The holdings and analysis in each case will be examined in turn.

Richmond Newspapers v. Virginia stemmed from a defense request to close the fourth trial of a defendant for the 1975 murder of a hotel manager. Prior to the fourth trial, the defense attorney moved that the trial be closed to the public and press. The prosecution raised no objection, and the Virginia Circuit Court judge ordered the courtroom cleared of all except "witnesses when they testify."[45] In a closed session, the court found the defendant not guilty[46] and Richmond Newspapers appealed the closure order to the Virginia Supreme Court, which found no reversible error, and denied the appeal.[47]

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[44] During voir dire proceedings, prosecution and defense attorneys question potential jurors as part of the process of seating an impartial jury.

[45] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 559 (1980).

[46] *Id.* at 562.

[47] *Id.*

On appeal, the U.S. Supreme Court reversed the lower court, ruling 7-1[48] that the First and Fourteenth Amendments to the U.S. Constitution guaranteed the press and public a right to attend criminal trials.[49] The Court based its decision on a two step test that came to be known as the experience and logic tests. First, the "unbroken, uncontradicted history" of openness of trials mandated continued press and public access absent an "overriding interest" that would support closure.[50] Second, a court must examine the circumstances of each case individually and make specific findings before making a decision. Specifically, the Court said trial courts must determine whether any alternative to closure would meet the need to insure fairness.[51]

In a concurring opinion, Justices Brennan and White said the First Amendment provides an absolute right for the public to attend trials. Thus, this opinion said, the Virginia law was unconstitutional in any event and no examination of the presence of a compelling governmental interest in closure was necessary.[52] The opinion further said that secrecy was "profoundly inimical to [the] trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally."[53] In a brief dissent, Justice William Rehnquist said the issue before the Court was not whether a right of access was to be found in the U.S. Constitution, but rather whether "any provision of the Constitution may fairly be read to prohibit what the trial judge in the Virginia state court system did in this case."[54] He argued that no such constitutional provision existed.

Richmond Newspapers was a landmark ruling that has provided controlling precedent for the 22 years since its decision. However, the question of how far its effects might extend has led to additional litigation. In 1982, the U.S. Supreme Court used a Massachusetts case, *Globe Newspaper v. Superior Court*[55] to strengthen public access rights articulated in *Richmond Newspapers*. The Court ruled 6-3 that a Massachusetts law that required that the public and press be excluded from the courtroom during the testimony of minors who were victims of sexual abuse was unconstitutional.[56]

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[48] Associate Justice Lewis F. Powell took no part in the Court's deliberations or decision in this case.
[49] *Richmond Newspapers*, 448 U.S. at 580.
[50] *Id.* at 576.
[51] *Id.* at 580-581.
[52] *Id.* at 585.
[53] *Id.* at 595.
[54] *Id.* at 606.

In his majority opinion, Justice Brennan clearly articulated the experience and logic tests first established under *Richmond Newspapers:*

> First, the criminal trial historically has been open to the press and general public. … a tradition of openness implies the favorable judgment of experience.
>
> Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. … Public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.[57]

The Court said the justification for closure must be a "weighty" one, and must not only further a compelling government interest, but also be narrowly tailored to serve that interest.[58] The Court conceded the state's interest in protecting minors from further embarrassment was compelling. It also said protecting victims from additional trauma and encouraging them to come forward to testify was important. However, the majority held these arguments did not justify a mandatory, blanket closure requirement.[59] A concurring opinion by Justice Sandra Day O'Connor strongly supported the decision, but emphasized that she interpreted both *Globe Newspaper* and *Richmond Newspapers* to apply only to criminal trials.[60]

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[55] Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).
[56] *Id.* at 602.
[57] *Id.* at 605-606.
[58] *Id.* at 606-607.
[59] *Id.* at 608, 610.
[60] *Id.* at 611.

In a dissenting opinion, Chief Justice Burger, joined by Justice Rehnquist, criticized the majority opinion's conclusion that the *Richmond Newspapers* decision opened all aspects of all criminal trials in all circumstances.[61] He said the majority opinion ignored a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors.[62] Burger also argued that since transcripts of the trial, including the identity and testimony of the minor witness, had been released to the media and the public, Massachusetts was not inhibiting the flow of information.[63]

Three years after the *Richmond Newspapers* decision, the Supreme Court extended access rights to voir dire proceedings[64] to the public and press. In *Press-Enterprise v. Superior Court of California (Press Enterprise I)*, the Court ruled 8-0 that a judge's order excluding the public from most of the voir dire proceeding was unconstitutional.[65] The Court held that like criminal trials themselves, jury selection proceedings have "presumptively been a public process with exceptions only for good cause shown."[66] The Court relied on its *Richmond Newspapers* reasoning to determine that trial closures must be rare and "only for cause shown that outweighs the value of openness."[67] Further, the Court said to justify closure, the trial judge would be required to hold a hearing and demonstrate through specific findings of fact that the closure was "essential to protect higher values and [was] narrowly tailored to serve that interest."[68]

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[61] *Id.* at 613.
[62] *Id.* at 614.
[63] *Id.* at 615.
[64] During voir dire proceedings, potential jurors are questioned in an attempt to determine potential biases that could affect their ability to render an impartial verdict. While questions may not directly address the points of the case to be tried, attorneys will ask philosophical questions on general topics similar to trial issues that attempt to identify juror biases. Following the voir dire proceedings, the jury is sworn by the judge and the case proceeds to trial.
[65] Press-Enterprise v. Superior Court of California, 464 U.S. 501, 503 (1984). The judge's decision closed all but three days of the approximately six-week voir dire proceeding.
[66] *Id.* at 505.
[67] *Id.* at 509.
[68] *Id.* at 510.

In 1986, the U.S. Supreme Court decided the last of its cases considering the extent of public and press access rights established by *Richmond Newspapers.* In *Press-Enterprise v. Superior Court of California (Press-Enterprise II),* the Court ruled 7-2 that the public had a First Amendment right to attend preliminary hearings.[69] The Court said a preliminary hearing functions much like a full scale trial and merited public access.[70] Writing for the majority, Chief Justice Warren Burger said because of "the absence of a jury" in a preliminary hearing, it "makes the importance of public access to a preliminary hearing even more significant."[71]

THE DETROIT FREE PRESS AND NORTH JERSEY MEDIA CASES

Two 2002 cases dealt with the applicability of *Richmond Newspapers* right of access to quasi-judicial proceedings held by the Immigration and Naturalization Service to determine whether aliens should be deported. Media groups in Michigan and New Jersey sued Attorney General John Ashcroft, arguing that a blanket order to close the deportation hearings to the press and public violates the First Amendment right of access articulated in *Richmond Newspapers* and extended by *Globe Newspaper Co., Press-Enterprise I,* and *Press-Enterprise II.* In both cases, U.S. District Court judges ruled in favor of the media plaintiffs.

In both the *Detroit Free Press* and *North Jersey Media Group* cases the plaintiffs moved for summary judgment, arguing the blanket closure of the immigration hearings was unconstitutional. The government opposed the motions, claiming that it was entitled to deference due to its plenary power over immigration and that the potential harm to national security justified closure. Using the two-pronged *Richmond Newspapers* test, U.S. District Court Judge Nancy G. Edmunds first found a First Amendment right for public access to the deportation hearing. She noted that several lower courts had relied on *Richmond Newspapers* to extend public access rights to civil trials and administrative proceedings.[72] She also cited a New York district court case[73] which found that an immigration judge had abused his discretion in closing a deportation hearing.[74]

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[69] Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986).
[70] *Id.* at 7.
[71] *Id.* at 12-13.

To determine whether the experience test had been satisfied, Edmunds said INS regulations had mandated open deportation proceedings for nearly 50 years. She also said Congress had repeatedly refused to order closure of deportation proceedings, though it had expressly directed that INS exclusion hearings be closed.[75] Turning to the logic prong, Edmunds said a number of reasons justified access to all proceedings, whether criminal or civil trials, or administrative proceedings. They included a sense of fair play, protection of the individual from "unwarranted and arbitrary conviction," protection from "lax prosecution," public confidence in administrative proceedings, and ensuring that the "agency is doing its job."[76]

Edmunds acknowledged that the First Amendment right of access to the deportation hearing was not absolute and that closures might be permissible with the presentation of a compelling government interest that would overcome the presumption of access. She rejected a government argument that it should be required to prove only a "facially legitimate and bona fide interest" to justify the closure, saying precedents from both the Supreme Court and lower courts mandated the application of a strict scrutiny standard to justify closure.[77] She determined that the Creppy memo was not sufficiently narrow to satisfy constitutional requirements and that the government had not proved substantial harm to anyone. Following her analysis, she granted the plaintiffs' motion for a preliminary injunction.

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[72] *See See* United States v. Criden, 675 F.2d 550, 554 (3d Cir. 1982) (attendance at pretrial suppression hearings); Publicker Industries, Inc. v. Cohen, 733 F.2d. 1033 (3d Cir. 1984) (extending First Amendment rights of access to civil proceedings); Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569, 574 (D. Utah 1985) (applying *Richmond Newspapers* standard to an Mine Safety and Health Administration investigative hearing); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983) (finding a right of access to documents in a civil proceeding); Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972) (finding right of access to a Civil Service Commission removal hearing).

[73] Pechter v. Lyons, 441 F. Supp. 115 (S.D.N.Y. 1977).

[74] *Detroit Free Press,* 192 F. Supp. 2d at 942..

[75] *Id.* at 943.

[76] *Id.* at 943-944.

[77] *Id.* at 945.

In the *North Jersey Media Group* case, the government initially raised, and then dropped, similar jurisdictional arguments. After withdrawing its objection on jurisdictional grounds, the government argued that the case was rendered moot, an argument rejected by the district court due to the likelihood of the argument resurfacing elsewhere.[78] After ruling on the jurisdiction question, the district court turned to the merits of the First Amendment arguments raised by the media group. The court acknowledged the government's plenary power to regulate immigration, but said the U.S. Supreme Court had ruled that such power must respect "procedural safeguards of due process."[79] The district court further said the Creppy memo's blanket closure provision was not intended to "advance the application of immigration statutes, but, rather, to serve other law enforcement objectives."[80] Thus, the court said, the Creppy memo was not beyond judicial review due to plenary authority, as argued by the government.

After establishing its judicial review authority, the district court next examined whether *Richmond Newspapers* was the correct controlling precedent. It rejected government arguments that cases such as *Houchins v. KQED*[81] and *Capital Cities Media v. Chester*[82] were applicable precedents, saying those cases referred to information held by the government and not access to government proceedings.[83] The *New Jersey Media Group* court also discounted a government reminder that no court had established a First Amendment right to attend deportation hearings. The judge ruled that the lack of such a substantive ruling did not preclude the existence of a right or provide a basis for departing from the *Richmond Newspapers* precedent. The judge also cited numerous cases in which courts had relied on *Richmond Newspapers* and its progeny and the *Detroit Free Press* ruling in finding First Amendment rights to attend not only criminal proceedings but also civil proceedings and even administrative proceedings.[84] With that finding, the court applied the *Richmond Newspapers* test to determine whether the immigration hearing closure was constitutional.

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[78] North Jersey Media Group v. Ashcroft, 205 F.Supp.2d at 292 n.2 (2002).
[79] *Id.* at 296.
[80] *Id.* at 297.
[81] 438 U.S. 1 (1978).
[82] 797 F.2d 1164 (3d Cir. 1986).
[83] North Jersey Media Group v. Ashcroft, 205 F. Supp. 2d at 299.

The district court said a decision by the U.S. Supreme Court in 1903[85] established a requirement for due process in a proceeding the purpose of which was to consider removal of a resident alien. The *North Jersey Media Group* court said the "touchstone" of such due process rights "is the right to an open hearing."[86] The district court also cited federal regulations that mandated a presumption of openness for deportation hearings[87] as bolstering the argument for a favorable finding under the *Richmond Newspapers* experience test.[88]

Concerning the *Richmond Newspapers* logic prong, the district court said that since deportation hearings affect a person's "liberty interest," constitutional due process guarantees must be respected.[89] The court also found that deportation proceedings have "undeniable similarities to judicial proceedings," in that an alien may be represented by counsel, answers to a list of charges, has the right to present witnesses and may cross-examine government witnesses.[90] The court said these similarities led to a conclusion that the same public interests that justified open judicial proceedings also justified open deportation proceedings.

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[84] *Id.*
[85] Yamataya v. Fisher, 189 U.S. 86 (1903) (The "Japanese Immigrant Case").
[86] 205 F. Supp. 2d at 300.
[87] *See* 8 C.F.R. § 242.16(a) (1964); 8 C.F.R. § 3.27 (2002).
[88] 205 F. Supp. 2d at 300.
[89] *Id.* at 301.
[90] *Id.*

Finally, the district court examined the government's claim that even if the *Richmond Newspapers* precedent were applied, its compelling interest in avoiding setbacks in its terrorist investigation and prevention of harm or stigma to detainees would outweigh the media's First Amendment rights.[91] The government's arguments were based on the *Globe Newspaper* ruling that a proceeding could be closed if the closure order was based on "a compelling government" interest and was "narrowly tailored to serve that interest."[92] The district court ruled that the very information the Creppy memo was designed to keep secret would be provided to the alien and his/her attorney. Further, the court said the Creppy memo's blanket closure order was not narrow enough and that *in camera* review was an acceptable means for determining when government evidence needed to remain secret.[93]

Relying on the experience and logic tests established in *Richmond Newspapers* and its progeny, both district courts ruled in favor of public and media access to deportation hearings. Both judges found a First Amendment right of access and rejected the blanket closure orders mandated by the Creppy memo.

The Sixth Circuit Court Ruling.

Both the *Detroit Free Press* and the *New Jersey Media Group* rulings were immediately appealed, to the Sixth and Third Circuit Courts of Appeals, respectively. In the *Detroit Free Press* case, the Sixth Circuit Court of Appeals unanimously affirmed the lower court ruling in a strongly worded opinion. The court said that "an informed public is the only defense against misgovernment," but that the government was trying to "take this safeguard away by placing its actions beyond public scrutiny."[94]

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[91] *Id.*
[92] 457 U.S. at 606-607 (1982).
[93] 205 F. Supp. 2d at 302.
[94] Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002)

The circuit court rejected government arguments that the district court had erred in not granting deferential review to the government's plenary power over immigration, saying such deferential review was due only to substantive immigration laws.[95] The court ruled that "non-substantive" procedural rules such as the Creppy memo were not entitled to such deferential review. Thus, the court said, to justify closure the government must prove that the Creppy memo was sufficiently narrow to pass constitutional muster. The court said the government had not satisfied this requirement.[96]

The Sixth Circuit Court applied the *Richmond Newspapers* test to find a First Amendment right of public access to deportation proceedings.[97] It rejected *Houchins v. KQED*[98] as the controlling precedent, saying the Supreme Court in that case found the press had no greater right of access than the general public. The circuit court said in the *Detroit Free Press* case, the plaintiff was not asserting a special right of access. The court also said the repeated application of the two-pronged *Richmond Newspapers* test indicated the Supreme Court was moving away from its *Houchins* position and recognized a limited constitutional right to at least some government information.[99]

The circuit court also noted that the *Richmond Newspapers* test had been extended beyond criminal judicial proceedings to civil and some administrative proceedings. It acknowledged, however, that while several district and circuit courts had granted such extensions, the U.S. Supreme Court had never addressed the extension of First Amendment rights beyond criminal judicial proceedings.[100]

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[95] Substantive immigration regulations are those specifically passed by Congress under its plenary authority to govern who may enter and stay in this country. Non-substantive regulations apply to immigration/deportation procedures.

[96] *Detroit Free Press*, 303 F.3d at 692-693.

[97] *Id.* at 705.

[98] 438 U.S. 1 (1978).

[99] 303 F.3d at 695.

In considering the experience prong of the *Richmond Newspapers* test, the circuit court rejected a government argument that the history of openness for deportation proceedings was not sufficient to satisfy the longevity requirement. The court noted that in *Press-Enterprise II,*[101] the Supreme Court had relied on post-Bill of Rights history to satisfy the experience requirement. The circuit court opinion said that while the context of history was important, "a brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted."[102] In addition, the circuit court argued that the deportation hearings were substantially similar to judicial proceedings, thus strengthening the applicability of the *Richmond Newspapers* test. Paraphrasing the U.S. Supreme Court's phrase in a South Carolina case,[103] the circuit court noted that the deportation proceedings "walk, talk, and squawk very much like a judicial proceeding."[104]

Turning to the *Richmond Newspapers* logic prong, the circuit court identified five reasons that access to deportation hearings served a public interest:

1. Public access acts as a check on the actions of the executive branch.
2. Openness insures that the government does its job properly.
3. The cathartic effect of open deportations cannot be overstated.
4. Openness enhances the perception of integrity and fairness.
5. Public access helps insure public participation in the governmental process.[105]

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[100] *Id.* at 695 n. 11.
[101] 478 U.S. at 10-12.
[102] 303 F.3d at 701.
[103] Federal Maritime Commission v. South Carolina State Ports Authority, 122 S. Ct. 1864, 1873 (2002).
[104] 303 F.3d at 702.
[105] *Id.* at 703-04.

The circuit court determined the government had provided no evidence to refute these findings of public benefit.

Finally, the court ruled that the government had not met its burden of proving that a compelling government interest could be satisfied in no less restrictive way than closure. The court disagreed with the district court ruling that the government had not identified a compelling interest in closure. The circuit court opinion said the government's interest in preventing terrorism was compelling. It also recognized the government's "mosaic theory"[106] and agreed that the revelation of certain pieces of information could be highly detrimental to government anti-terrorism efforts. However, the circuit court said the immigration judge had not made specific findings before closing the Haddad deportation hearing as required by *Press-Enterprise II*.[107] Further, the court said, the Creppy memo, mandating a blanket closure for all "special interest" deportation proceedings, was not narrowly tailored. The court said *in camera* review of sensitive information was an acceptable alternative to closure of the hearing.[108]

The Third Circuit Court Ruling

Shortly after the Sixth Circuit Court ruling, the Third Circuit Court of Appeals issued a conflicting ruling in the *North Jersey Media Group* appeal.[109] While the Third Circuit Court applied the *Richmond Newspapers* test, it ruled 2-1 that the district court had assigned too great a significance to the benefits to society of an open proceeding and had not adequately considered the potential harm of such openness. The majority argued that the September 11th attacks had focused the country's national policy on self-preservation. Thus the logic test must carefully consider the impact of open hearings on national security when applying the *Richmond Newspapers* test.[110]

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[106] The "mosaic theory" holds that while bits and pieces of information themselves might appear innocuous, used by terrorist groups, they help form a bigger picture of the government's terrorism investigation. The theory was first recognized in *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972).

[107] 303 F.3d at 707.

[108] *Id.* at 708.

[109] North Jersey Media Group v. Ashcroft, 2002 U.S. App. LEXIS 21032, at *1 (3d Cir. Oct. 8, 2002).

Further, the majority opinion argued that while deportation hearings had largely been open since 1965, Congress had never explicitly mandated openness. It further said that the recent nature of the regulatory presumption of openness included significant statutory exceptions and "[did] not present the type of 'unbroken, uncontradicted history' that *Richmond Newspapers* and its progeny require[d] to establish a First Amendment right of access."[111] The circuit court argued that the history and experience were both "recent" and "rebuttable," and were not "the stuff of which Constitutional rights are forged."[112] Thus, the court agreed with the government's argument that the *Richmond Newspapers* experience test had not been met.

The circuit court opinion acknowledged the holding in *Federal Maritime Commission v. South Carolina State Ports Authority* [113] that the deportation hearings bore an "undeniable resemblance to civil trials," and that, "read broadly," the language might "suggest the same First Amendment rights exist in each context."[114] However, the court rejected that interpretation, saying the South Carolina case dealt specifically with the sovereign immunity of a non-consenting state to be shielded from complaints brought by a private person and did not address the fundamental issue of public access to administrative hearings.[115] The court noted that many administrative hearings remain closed to the public.[116] It also questioned whether the Supreme

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[110] *Id.* at *11.
[111] *Id.* at *7.
[112] *Id.* at *43.
[113] 122 S. Ct. 1864 (2002).
[114] North Jersey Media Group v. Ashcroft, 2002 U.S. App. LEXIS 21032, at *8 (3d Cir. Oct. 8, 2002).
[115] *Id.* at *8-9.
[116] *Id.* at *9.

Court intended to apply the "full panoply of Constitutional rights to any administrative proceeding that resemble[d] a civil trial."[117]

Concerning the national security implications of open deportation hearings, the majority opinion described the government's "mosaic theory" in great detail. Significantly, it accepted a government argument that requiring closure of hearings on a case-by-case basis would expose "critical information about which activities and patterns of behavior" were necessary to offer justification for the closure.[118] The court agreed that the government's contentions were speculative but said that the potential benefits of open deportation proceedings under the *Richmond Newspapers* logic prong were also speculative. The court said it was disinclined to conduct a hearing into the credibility of security concerns since courts have historically deferred to the executive branch on such matters.[119]

In a dissenting opinion, Judge Sirica agreed that *Richmond Newspapers* was applicable but asserted that the two-part test had been met. He recounted the history of deportation hearing openness and noted that though Congress had repeatedly exempted INS exclusion hearings from statutory openness, it had not done so with deportation hearings.[120] He also rejected the majority's argument that the history of openness was uneven, noting that exceptions to openness also existed in criminal trials and the Supreme Court had found the history of openness in those proceedings to be unbroken and uncontradicted.[121]

Sirica also rejected the majority's likening deportation hearings to other administrative proceedings such as Social Security hearings. He noted that deportation hearings were adversarial while many other administrative hearings were inquisitive. Further, he noted that inquisitive proceedings such as social security hearings collected private medical and financial information that argued in favor of closure.[122] Sirica also argued that *Richmond Newspapers* and its progeny required a decision based on the type of proceeding, not the subject matter involved. Thus, he said, the logic prong must consider the benefits of openness of deportation hearings generally, not whether "special interest" cases should be open.[123] Sirica concluded that the *Richmond Newspapers* test required that hearings be presumptively open and that immigration judges should review evidence *in camera* to determine on a case-by-case basis whether closure was warranted. He noted that even closure hearings could be held in secret. He said such a procedure had proven workable in criminal courts.[124] Thus, he concluded, the Creppy memo was over-broad and unacceptably infringed on the Constitution.

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[117] *Id.* at *50.
[118] *Id.* at *61.
[119] *Id.* at *61-62.
[120] *Id.* at *68.
[121] *Id.* at *69 n. 3.

WHICH COURT BEST ADHERED TO U.S. SUPREME COURT PRECEDENT?

While they agreed on little else, the Sixth and Third Circuit Courts of Appeals both saw *Richmond Newspapers* as the proper controlling precedent. The Sixth Circuit Court interpreted *Richmond Newspapers* broadly and seemed to be willing to go beyond existing precedent to extend First Amendment access rights to administrative proceedings. It took a firm civil libertarian approach and found access arguments highly compelling. The court was not persuaded by government national security arguments. As the *Harvard Law Review* article stated, the Sixth Circuit Court did not allow "historical silence by itself to defeat a right of access claim."[125]

Conversely, the Third Circuit Court interpreted both U.S. Supreme Court and its own previous decisions very narrowly in reaching its decision. It was unwilling to extend rights beyond existing precedent, and said it would not be bound by dicta in its previous rulings that contradicted its conclusions in the current case. It was also quite willing to defer to executive branch expertise to determine whether a national security emergency existed. Thus, whether a First Amendment right of access to deportation proceedings exists depends on which court more closely adhered to U.S. Supreme Court precedent and perceived intention in making its decision.

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[122] *Id.* at *74.
[123] *Id.* at *77.
[124] *Id.* at *84.
[125] HARV. L.REV., *supra* note 22, at 1200.

The answer to that question seems to center on two issues: 1)whether the limited access rights established by *Richmond Newspapers* and its progeny for criminal proceedings should be extended to administrative deportation hearings; and 2) whether a heightened national security concern in light of the September 11th attacks is a sufficiently compelling government interest to overcome the right of access.

The First Amendment access rights established in *Richmond Newspapers, Globe Newspaper*, and *Press- Enterprise I* applied specifically to criminal trials. Those rights were extended through *Press-Enterprise II* to preliminary hearings. The U.S. Supreme Court has never directly considered a case extending public access rights further, and its refusal to hear the *North Jersey Media Group* case continued that dearth. In a footnote in *Richmond Newspapers,* Chief Justice Warren Burger acknowledged that civil trials had been likewise historically open, indicating the Court might look favorably on extension of First Amendment rights to civil proceedings.[126] In *Press-Enterprise II,* he noted that preliminary hearings were much like trials, and that "the First Amendment question cannot be resolved solely on the label we give the event." [127] In *Federal Maritime Commission v. South Carolina State Ports Authority,* the majority said that some adversarial administrative proceedings were enough like criminal trials as to be nearly indistinguishable.[128] However, the Court stopped short of determining that such hearings should be considered the same as criminal trials for all purposes. Other courts have extended access rights to civil cases[129] and some administrative proceedings.[130] However, it must be stressed that these actions have been taken by lower courts and not by the U.S. Supreme Court.

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[126] 448 U.S. at 580 n. 17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open").
[127] 478 U.S. at 7.

The Sixth Circuit Court cited the importance of deportation hearings respecting due process rights for aliens. Considerable precedent suggests aliens are entitled to such rights. In *Wong Wing v. United States,* the Supreme Court held that an alien who had entered the country and was living here was entitled to Fifth Amendment due process rights at a deportation hearing.[131] The Court affirmed that ruling in *Shaughnessy v. United States, ex. rel Mezei,* saying even if an alien had arrived illegally, he could be expelled "only after proceedings conforming to traditional standards of fairness."[132] If aliens are, indeed, entitled to due process rights, it is reasonable to assume they would be entitled to an open hearing. This argument is weakened, however, by the Court's has determination that such Sixth Amendment rights are personal. Plaintiffs relying on such due process arguments to justify public and press access have been unsuccessful. In *Richmond Newspapers* and its progeny the Court repeatedly found public benefits of open trials, citing enhanced confidence in the observance of due process rights as one of those benefits. The identification of these benefits strengthens the argument for extending to deportation hearings the same public access rights established for criminal trials.

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[128] 122 S. Ct. at 1873 (The Ports Authority hearings were said to "walk, talk, and squawk like a criminal trial").
[129] Publicker Industries, Inc. v. Cohen, 733 F.2d. 1033 (3d Cir. 1984).
[130] Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569, 574 (D. Utah 1985).
[131] 163 U.S. 228, 238 (1896).
[132] 345 U.S. 206, 212 (1953).

The history prong of the *Richmond Newspapers* test was originally based on an "unbroken, uncontradicted" history of openness in criminal trials.[133] In *Press-Enterprise II* the Supreme Court recognized that newer types of proceedings would have shorter histories.[134] offering a precedent that a shorter tenure of openness might satisfy this prong. Ironically, another factor arguing for recognition of sufficient history is immigration law's youth. The first immigration laws were passed scarcely more than 100 years ago. The hearings have been open by regulatory mandate since 1965. It seems illogical to require a history of openness from even colonial times when the proceedings themselves were not in existence.

A stronger argument, however, is the lack of congressional direction closing the hearings. The Sixth Circuit Court noted that exclusion hearings have been closed by law since 1893. However, the court also noted that the Congress has amended the Immigration and Nationality Act at least 53 times without mandating closure for deportation proceedings.[135] This fact seriously weakens the Third Circuit Court's argument that Congress has never explicitly directed that such hearings be open. Though a direct action is more compelling than a lack of action, that Congress has explicitly and consistently ordered that exclusion hearings be closed while remaining silent on the closure of deportation hearings provides a strong indication of congressional intent and argues in favor of openness. From these arguments, it is reasonable to conclude that the experience prong mandated by *Richmond Newspapers* has been satisfied.

As the conflicting courts of appeals opinions demonstrate, determining whether the *Richmond Newspapers* logic prong has been satisfied is subjective. The Third Circuit Court acknowledged a legitimate public interest in openness but argued that national security concerns had been accorded insufficient attention by the district judge in the *North Jersey Media Group* trial. In the *Detroit Free Press* case, the Sixth Circuit Court acknowledged national security concerns but placed greater emphasis on the benefits of openness, articulating five specific public interests served by open proceedings.[136] In his *North Jersey Media Group* dissent, Third Circuit Judge Sirica attempted to find middle ground by advocating a presumption of openness while allowing immigration judges considerable latitude to find national security justification for closure on a case-by-case basis.

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[133] 448 U.S. at 576.

[134] *See* 478 U.S. at 10-12. The U.S. Supreme Court determined a history stretching to the time of the Bill of Rights was sufficient to satisfy the history prong requirement.

[135] *Detroit Free Press*, 303 F.3d at 701.

While national security concerns are enhanced following the September 11th attacks, public interest in proceedings dealing with nearly any aspect of alleged terrorist connection may be commensurately greater. The Sixth Circuit's articulation of specific benefits seems reasonable in view of this great public interest. Additionally, public access might allay due process and fairness concerns. In *Press Enterprise I,* the U.S. Supreme Court said openness reassures the public "that standards of fairness are being observed."[137] Conversely, secrecy provides no such assurance. The Supreme Court noted in *Richmond Newspapers,* that the criminal process must satisfy the "appearance of justice" if it is to work effectively.[138] Openness allows the public to have confidence that justice is being served. Given the presumptive benefit of openness as articulated in *Richmond Newspapers* and its progeny, it seems reasonable to conclude that the logic test has been met. It is also reasonable to argue that a First Amendment right of public access as established by *Richmond Newspapers* and its progeny applies to deportation hearings. Thus, the answer to the first research question raised in this paper is in the affirmative.

A First Amendment right of access as discussed above would invalidate closures without specific findings. In *Globe Newspaper,* the Supreme Court noted:

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[136] *See* text accompanying *supra* note 127.
[137] 464 U.S. at 508.
[138] 448 U.S. 571-572.

> We emphasize that our holding is a narrow one: that a rule of mandatory closure … is unconstitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public. … But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.[139]

In this passage, Chief Justice Warren Burger appeared to allow closures "under appropriate circumstances." In his *North Jersey Media Group* dissent, Third Circuit Judge Sirica agreed, proposing that closure of deportation hearings be determined on a case-by-case basis. He argued such an approach would allow immigration judges to balance public and national security interests.[140] Because of the *Globe Newspapers* ruling, and because an appropriate and less restrictive alternative is available, the blanket closure ordered by the Creppy memo seems to be unconstitutional. Thus, the answer to the second research question is also in the affirmative. Based on the above analysis, it is reasonable to conclude that the public and press should enjoy the same access rights to attend deportation hearings that are afforded them to attend criminal trials.

The Supreme Court's decision not to hear the case leaves the questions raised in this paper unanswered. Though the denial of certiorari frustrated efforts to open deportation hearings, the non-decision might have been helpful in at least one way. Had the Supreme Court agreed to hear the case and decided firmly in favor of the government's arguments in favor of secrecy, it would have established a precedent that might undermine current access rights established under *Richmond Newspapers* and its progeny. Even without a clear Supreme Court precedent, some appellate courts have deferred to government arguments citing the need to maintain secrecy. For instance, the Third Circuit Court in the *North Jersey Media Group* decision reversed a series of decisions favoring openness and public access. In an even more recent case, the U.S. Court of

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[139] 457 U.S. at 611, n27.
[140] *North Jersey Media Group*, 2002 U.S. App. LEXIS 21032, at *86.

Appeals for the District of Columbia reversed a lower court ruling directing the Justice Department to release the names of persons detained following the September 11 attacks, rejecting the plaintiffs' argument in favor of both First Amendment and common law rights of access.[141] While troubling, those rulings do not carry the same weight as a precedent-setting decision by the U.S. Supreme Court.

Though, for the reasons articulated in this paper, a decision favoring open deportation hearings seems justified under *Richmond Newspapers* and its progeny, the current makeup of the U.S. Supreme Court raises doubts that such a decision would be forthcoming from the Court. Of the current justices, only three participated in the decisions in *Richmond Newspapers* and its progeny. Chief Justice Rehnquist dissented in three of the four cases, joining the majority only in *Press-Enterprise I.* Justice Stevens joined the majority decision in *Richmond Newspapers* and *Press-Enterprise I,* but dissented in *Press-Enterprise II* and *Globe Newspaper.* Justice O'Connor did not participate in the *Richmond Newspapers* decision. She voted with the majority in the other three cases. However, in a concurring opinion in the *Globe Newspaper* decision, she clearly stated that the public access rights established under *Richmond Newspapers* and *Globe Newspaper* applied only to criminal trials and did not "carry any implications outside the context of criminal trials."[142] Joined by the Court's other strict constructionists, Justices Scalia and Thomas, a ruling in favor of the government would be highly possible.

The Court's refusal to decide the status of press access to deportation hearings has left a striking dichotomy. Secret hearings are permissible in the Third Circuit Court's jurisdiction, but such hearings are not legal in the Sixth Circuit Court's jurisdiction. In the now-reversed U.S. District Court ruling ordering release of the names of detainees held by the Justice Department, the judge said: "Difficult time such as these have always tested our fidelity to the core democratic values of openness, government accountability and the rule of law….[T]he first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."[143] The recent court decisions do not provide that clear-cut mandate.

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[141] Center for National Security Studies v. U.S. Department of Justice, 203 U.S. App. Lexis 11910, at *2 (D.C. Cir. June 17, 2003).
[142] Globe Newspaper v. Superior Court, 457 U.S. 596, at 611 (1982).

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[143] Center for National Security Studies v. Department of Justice, 2002 U.S. Dist. LEXIS 14168, at *3-4 (D.D.C.Aug. 8, 2002).

Cross Burning Revisited: What The Supreme Court Should Have Done in *Virginia v. Black* and Why it Didn't

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Cross Burning Revisited: What The Supreme Court Should Have Done in *Virginia v. Black* and Why it Didn't

Abstract

The Supreme Court's 1992 decision *R.A.V. v. St. Paul* holding a cross-burning ordinance to be unconstitutionally discriminatory created as many questions as it answered. During its most recent term, the Supreme Court is again considered a prohibition against cross burning. The Court held a Virginia state law prohibiting cross burning to be unconstitutional, though it ruled that cross burning, in some instances constitutes intimidating speech, and the Court held that intimidating speech is not protected by the First Amendment. The Court did not establish a test to determine when speech becomes intimidating. The Court, therefore, wasted an opportunity to clarify the muddle it created more than ten years ago and left for another day issues that it should have resolved.

CROSS BURNING REVISITED:
WHAT THE SUPREME COURT SHOULD HAVE DONE IN *VIRGINA V. BLACK* AND WHY IT DIDN'T[*]

In 1992, in what surely must be one of its most convoluted opinions involving free speech issues,[1] the Supreme Court of the United States reversed the conviction of a juvenile who had burned a makeshift cross in the yard of a neighbor.[2] The young man, known only as R.A.V. because of his age,[3] had been convicted of violating three federal statutes — convictions that would be upheld[4] — but could not be convicted of the cross burning, the Court held, because the St. Paul ordinance under which he was convicted was discriminatory.[5]

The Court's holding in *R.A.V. v. St. Paul* has been demonstrated by both the literature and the case law to be anything but clear-cut. In a maze of rationale that is still difficult to follow, the Court did not say outright that cross burning is constitutionally protected. Indeed, it established a complicated framework that, despite years of case law

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[*] An earlier version of this paper was presented at the AEJMC Southeast Colloquium, March 6-8, 2003, Little Rock, Ark.

[1] The use of the word "convoluted" to describe the opinion is not original to this paper. *See* Jerome O'Callaghan, *Free Speech by the Light of a Burning Cross,* 42 CLEV. ST. L. REV. 215, 235 (1994). In addition, Justice John Paul Stevens called a portion of the majority opinion "opaque." R.A.V. v. St. Paul, 505 U.S. 377, 424 (1992) (Stevens, J., concurring in the judgment).

[2] R.A.V. v. St. Paul, 505 U.S. 377 (1992).

[3] The juvenile was Robert A. Viktora. He was subsequently identified in a number of sources. *See, e.g.,* EDWARD J. CLEARY, BEYOND THE BURNING CROSS: THE FIRST AMENDMENT AND THE LANDMARK R.A.V. CASE (1994); Nick Coleman, *It Takes a Creep to Burn a Cross,* ST. PAUL PIONEER PRESS, June 23, 1992, at 1B; Nick Coleman, *The Court Sends a Message. Hate Crimes: Will Ruling Spur Bigotry?* ATLANTA CONST., June 25, 1992, at A15.

[4] *See* United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994) (combining cases against three juveniles, including R.A.V.).

[5] 505 U.S. at 391.

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to the contrary, would allow the Court to hold a law banning cross burning to be constitutional, even if the law was not content neutral.[6]

The *R.A.V.* decision was met with a chorus of disapproval. The case, one scholar wrote, demonstrated "that no one theory of the application of the free speech guarantee yet commands widespread support. Indeed, the *R.A.V.* decision, aside from being riddled with ironies, is a classic example of a court united in judgment and divided in understanding."[7] Another commentator criticized the Court for ignoring "the fundamental issues surrounding hate crime legislation" and constructing an "intricate new rule."[8] Instead, the Court could have applied the same analysis it did in *Texas v. Johnson* – that is, the strict scrutiny analysis — and could have arrived at the same holding.[9] Or, the commentator continued, the Court could have created a new category of unprotected expression for hate speech, similar to that of fighting words, private libel and obscenity.[10]

In addition, since 1992, when the decision was delivered, states have taken up the challenge to produce laws that would pass constitutional muster while, at the same time, would ban cross burning. Cross-burning cases have been decided by six state appellate courts since *R.A.V.* In two of those cases, state statutes have been held to be constitutional;[11] in the remainder, the statutes – or portions of the statutes – have been held to be unconstitutional.[12]

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[6] *See, e.g., infra* notes 65-74 and accompanying text.

[7] O'Callaghan, *supra* note 1, at 216. *See also* Richard J. Williams Jr., *Burning Crosses and Blazing Words: Hate Speech and the Supreme Court's Free Speech Clause Jurisprudence*, 5 SETON HALL CONST. L.J. 609, 678-79 (1995).

[8] Michael S. Degan, Comment, *"Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1144 (1993).

[9] *Id.* at 1145 (citing Texas v. Johnson, 491 U.S. 397 (1989)).

[10] *Id.*

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When the Court took up the issue of cross burning for a second time, therefore, a reasonable deduction was that it did so to help resolve the confusion created by *R.A.V.* The issues seemed to be relatively clear-cut.

The Commonwealth of Virginia and its supporters had encouraged the Court to uphold a ban on cross burning because the history of the action made it so obnoxious that any expressive content was outweighed by hatred and virulence intrinsic to cross burning.[13] They also argued that cross burning consisted of conduct – specifically, threatening conduct – rather than speech[14] and, therefore, the government could more easily restrict it.[15] Indeed, *R.A.V.* had been criticized for creating an "intricate new rule" rather than a more reasonable alternative.[16] At least one commentator suggested that the Court create a new category of speech – "abhorrent" speech – that would include cross burning and other forms of speech that the Court would hold were unprotected by the Constitution.[17]

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[11] *See* In re Steven S., 31 Cal. Rptr. 2d 644 (Cal. Ct. App. 1994); Florida v. T.B.D., 656 So. 2d 479 (Fla. Ct. App. 1995). *See also infra* notes 166-70 and accompanying text.

[12] *See* Maryland v. Sheldon, 629 A.2d 753 (Md. 1993); New Jersey v. Vawter, 642 A.2d 349 (N.J. 1994); State v. Ramsey, 430 S.E.2d 511 (S.C. 1993); Washington v. Talley, 858 P.2d 217 (Wash. 1993). *See also infra* notes 177-92 and accompanying text.

[13] *See* discussion accompanying *infra* notes 236-42.

[14] *See id. See also* discussion accompanying *infra* notes 220-22.

[15] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).

[16] *See* Degan, *supra* note 8, at 1144.

[17] *See* Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech,* 65 S. CAL. L. REV. 1887 (1992). *See also* Degan, *id.* at 1145.

Free speech advocates, on the other hand, argued that the history of cross burning gave the activity its substantive message.[18] That is, cross burning was banned specifically because of the hateful message it conveyed, but the Constitution prohibited the proscription of speech just because it is obnoxious, offensive or even hateful.[19] Cross burning, they argued, is political speech, and political speech is core speech that deserves the highest protection of the First Amendment.[20]

In *Virginia v. Black,*[21] however, the Court refused the invitation to settle the issue and, taking a compromise position, tromped further into the mire that has surrounded cross burning for eleven years. It held that states have the power under the First Amendment to ban cross burning as intimidating speech.[22] Intimidating speech is equivalent to threatening speech, the Court held, which may be regulated.[23] However, the Court also found the Virginia statute to be unconstitutional because it restricted all forms of cross burning.[24] Some cross burning, the Court noted, is, in fact, political speech and deserving of First Amendment protection.[25]

The Court, therefore, chose to bifurcate the issue, making inevitable further opinions in which it will be required to carve out a test providing guidance for lower courts confronted with cross-burning cases. The history of the cross-burning debate in the courts demonstrates that a more logical path would have been for the Court to hold that cross burning is protected political speech, but to allow law enforcement agencies to prosecute cross burners when the activity is clearly threatening or is part of broader threatening conduct. That history of cross burning in the courts is described here, followed by an evaluation of the Court's decision in *Virginia v. Black.*

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[18] *See* Brief on Merits for Respondents at 13-14, Virginia v. Black, 553 s.E.2d 738 (Va. 2001) (No. 01-1107).

[19] *See id.* at 15.

[20] *See* C. Catherine Scallan, *Cross-Burning is Not a Threat: Constitutional Protection for Hate speech,* 14 MISS. C.L.REV. 631, 651 (1994).

[21] 123 S.Ct. 1536 (2003).

[22] *Id.* at 1549.

[23] *Id.* at 1548.

[24] *Id.* at 1551-52.

[25] *Id.* at 1551.

R.A.V. v. ST. PAUL

R.A.V., with at least two other teenagers, assembled a cross from broken chair legs and burned it in the fenced yard of a black family.[26] He was convicted of violating St. Paul's Bias-Motivated Crime Ordinance, which provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[27]

The trial court dismissed the action on grounds that the ordinance was overbroad and impermissibly content-based, but the Minnesota Supreme Court reversed, holding that its narrow interpretation of the ordinance was sufficient to limit its reach only to fighting words.[28] The ordinance, therefore, according to the state supreme court, only reached speech not protected by the First Amendment.[29] R.A.V. appealed to the Supreme Court.

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[26] 505 U.S. 377, 379-80 (1992).

[27] *Id.* at 380 (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)).

Arguments to the Supreme Court

The questions presented to the Supreme Court in the petition for *certiorari* and in briefs on the merits focused on whether local governments could pass so-called "hate-crime" ordinances, even when those ordinances had been narrowly construed to proscribe only fighting words or incitement to imminent lawless action.[30] Attorneys for St. Paul argued that the ordinance only proscribed fighting words, true threats and "conduct directed to inciting or producing imminent lawless action."[31] Therefore, they argued, the ordinance is neither vague nor overbroad.

Under Minnesota law, they argued, a true threat need not be conveyed directly and in person, but is "a declaration of an intention to injure another." It must be made so that it supports the inference that a threat was intended. "Based on its historical and cultural subtext," the attorneys argued, "the burning of a cross under circumstances where it is aimed against one or a group of victims *is* such a threat."[32] The conduct, they continued, is directed at inciting or producing imminent lawless action and is likely to do just that. The only question is whether the threat is clear and present.[33] To an African American, such a threat is not "remotely ambiguous." The "reasonable and inevitable belief" of a person targeted by a cross burning is that further injury or death is likely unless the victim leaves the neighborhood.[34]

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[28] *Id.* at 380 (citing In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991)).

[29] *Id.* at 381. *See* In re Welfare of R.A.V., 464 N.W.2d at 510.

[30] *See* Petition for Certiorari at i, In the Matter of the Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991); Brief in Opposition to Petition for Writ of Certiorari at 1, In the Matter of the Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991); Brief for Petitioner at i, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief for Respondent at i, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991) (90-7675).

[31] Brief for Respondent at 5.

[32] *Id.* at 21 (emphasis in original).

Attorneys for R.A.V. disagreed. They argued that the ordinance was overbroad, that it regulated protected expressive conduct, and that it was not narrowly drawn to serve a compelling state interest.[35] The attorneys conceded that fighting words[36] and incitement to imminent lawless action[37] may be regulated under the First Amendment, but argued that neither type of expression was implicated by the St. Paul ordinance. Under the fighting words doctrine, they argued, the offensive language must be extremely personally offensive and must be uttered in a face-to-face manner to a specific individual rather than to a group.[38] In addition, they argued, it's not enough that there is the possibility for certain speech to provoke violence; there must be an immediate threat of violence.[39] Similarly, while imminent lawless action may be regulated, advocating violence in the abstract is not enough — there must be advocacy for the lawless violence to occur immediately.[40]

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[33] *Id.* at 22.

[34] *Id.* at 23.

[35] Brief of Petitioner at 4-7.

[36] *Id.* at 27.

[37] *Id.* at 29.

[38] *Id.* at 27 (citing Norwell v. City of Cincinnati, 414 U.S. 14 (1973); Lewis v. New Orleans, 408 U.S. 913 (1972) (Powell, J., concurring); and Gooding v. Wilson, 405 U.S. 518 (1972)).

[39] *Id.* at 28 (citing Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974)).

[40] *Id.* at 29 (citing Hess v. Indiana, 414 U.S. 105 (1973) (per curiam)).

The amicus briefs filed in the case, for the most part, advanced one of these two positions — either that the ordinance was overbroad and vague in its approach to regulating fighting words and advocacy of imminent lawless action, or that the ordinance had been sufficiently narrowed on these two points by the Minnesota Supreme Court. The Anti-Defamation League, for example, argued that the ordinance only prohibits fighting words or conduct directed at inciting imminent lawless action.[41] "A late-night cross burning in a black family's yard is an act of violence, terror, harassment and intimidation," the League's brief argued.[42] The American Civil Liberties Union, on the other hand, took the approach that, while some expression, like threats, could be proscribed,[43] the St. Paul ordinance remained overbroad.[44] The ACLU also argued that the ordinance went beyond proscribing threats or imminent lawless behavior — it proscribed expression that was obnoxious.[45]

The nature of R.A.V.'s expressive conduct — was it fighting words, a true threat or an incitement to imminent lawless action — and whether the St. Paul law had been sufficiently narrowed so that it addressed only those forms of expression were also raised at oral arguments. Indeed, the first questions posed to Edward J. Cleary, R.A.V.'s attorney, seemed to chide him because his brief had not focused more directly on the question at hand, which was "the statute as the Minnesota Supreme Court has interpreted it[.]"[46] From there, questions quickly focused on how fighting words are defined and whether states can proscribe words that cause fear for one's safety "even if the fear is for some act that will occur 24, 48 hours later."[47] Cleary said they could.[48] The Court then wanted Cleary to discuss the possible distinction made in *Chaplinsky v. New Hampshire*[49] between words that cause a breach of the peace and "words that injure."[50] Under questioning by the justices, Cleary admitted that he was arguing that the *Chaplinsky* reference to "words that injure" was, in fact, "an erroneous reference" that the Court should disavow.[51]

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[41] Brief of Amicus Curiae The Anti-Defamation League at 2, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991) (90-7675). *See also* Brief of Amicus Curiae The Asian American Legal Defense and Education Fund et al. at 5, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief of Amicus Curiae The Center for Democratic Renewal et al. at 2-3, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief of Amicus Curiae The State of Minnesota et al. at 4, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief of Amicus Curiae The National Association for the Advancement of Colored People et al. at 12-13, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief of Amicus Curiae The National Institute of Municipal Law Officers et al. at 2, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief of Amicus Curiae People for the American Way at 10, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991) (90-7675).

[42] *Id.* at 8.

[43] Brief of Amicus Curiae The American Civil Liberties Union et al. at 18, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991) (90-7675).

[44] *Id.* at 5-6, 19.

[45] *Id.* at 21-22.

The bulk of the argument by St. Paul's attorney, Thomas J. Foley, was that the Minnesota Supreme Court had interpreted the ordinance to prohibit only conduct that inflicts injury, tends to incite an immediate breach of the peace or provokes imminent lawless action.[52] Justices seemed to be concerned about the fact that the ordinance only prohibited certain types of expression aimed at certain groups. Because of the distinction, one justice noted, the ordinance seemed to be content-based.[53] Foley disagreed, but argued that, even if the Court found the law to be content-based, "[T]here is a compelling state purpose in public safety and order and safety of their citizens for the city of St. Paul to pass such an ordinance."[54]

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[46] Transcript of Oral Argument at 1, R.A.V. v. St. Paul, Dec. 4, 1991 (No. 90-7675).

[47] *Id.* at 3.

[48] *Id.*

[49] 315 U.S. 568 (1949).

[50] In *Chaplinsky*, the Court held that fighting words are not protected by the First Amendment, and defined "fighting words" as "those which by their very utterance *inflict injury* or tend to *incite an immediate breach of the peace.*" *Id.* at 572 (emphasis added).

[51] Transcript of Oral Argument at 7-8.

[52] *Id.* at 15.

The stage was set, then, for the Court to consider cross burning under the parameters of fighting words, true threats or incitement to imminent violence.

Justice Scalia for the Court

But Justice Antonin Scalia took a different route. He skirted the issue of overbreadth and all but ignored the issue of the nature of the expression — whether it constituted fighting words, a true threat or an incitement to imminent violence. He noted that the Court was bound by the construction given to the St. Paul ordinance by the Minnesota Supreme Court and, therefore, accepted the lower court's assertion that the ordinance reached only fighting words.[55] Justice Scalia did not mention the other forms of proscribable speech that had been prevalent in briefs and oral arguments – threats and advocacy of imminent lawless action – but only referred to fighting words. Despite accepting Minnesota's assertion that the St. Paul ordinance only addressed fighting words, however, Justice Scalia wrote that it was still unconstitutional because "[I]t prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[56]

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[53] Content-based restrictions on speech are presumed to be unconstitutional. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991); Boos v. Barry, 485 U.S. 312 (1988). *See also infra* notes 57-74 and accompanying text.

[54] Transcript of Oral Arguments at 16.

[55] R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992).

Then he launched into a new area of free expression law.

While the general proposition of the Court has always been that "content-based regulations are presumptively invalid,"[57] Scalia wrote, it is equally true that some "areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content."[58] Obscenity and defamation are two examples. Even though the Court has indicated that certain categories of expression are not within the area of constitutionally protected speech, Scalia wrote, "Such statements must be taken in context" and are not "literally true."[59]

Based on that proposition, Scalia advanced a second proposition, namely that speech can be proscribable on the basis of one feature but not on the basis of another. Such a proposition, he wrote, "is commonplace and has found application in many contexts."[60] That means, for example, that burning a flag in violation of an ordinance against outdoor burning could be punishable, while burning a flag in violation of an ordinance prohibiting the dishonoring of the flag could not.[61] Similarly, time, place and manner restrictions on speech have been upheld as constitutional.[62] And, Scalia wrote, that also means that fighting words can be restricted, not based upon the content of the message they convey, but because of their "nonspeech" elements. "Fighting words are thus analogous to a noisy sound truck: Each is, . . 'a mode of speech;' both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment."[63] The Court never said, Scalia wrote, that fighting words constitute "*no* part of the expression of ideas, but only that they constitute 'no *essential* part of any exposition of ideas.'"[64]

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[56] *Id.*

[57] *Id.* at 382.

[58] *Id.* at 383.

[59] *Id.*

[60] *Id.* at 385.

[61] *Id.*

[62] *Id.* at 386.

But Scalia also noted that the prohibition against content discrimination is not absolute.[65] The rationale for the prohibition is that content discrimination raises the specter that the government may drive some viewpoints from the marketplace of ideas.[66] But content discrimination among various instances of a class of proscribable speech often does not pose that threat, he wrote.[67] Justice Scalia then delineated three supposed exceptions to the general prohibition against content discrimination. Although he did not enumerate his exceptions, they have become a sort of test some lower appellate courts have appropriated in deciding cross-burning cases.[68]

First, Scalia wrote, when the basis for content discrimination consists "entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[69] A state, therefore, may prohibit only the most patently offensive types of obscenity, even though punishment is allowed for the publication of any material that is deemed obscene. But, the state may not punish only obscene material that contains certain political messages.[70] Similarly, the federal government can criminalize threats of violence directed against the President, but may not criminalize only those threats that mention the President's various policies.[71]

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[63] *Id.*

[64] *Id.* at 385 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (emphasis in original).

[65] *Id.* at 387.

[66] *Id.* (quoting Simon & Schuster v. New York State Crime Victims Board, 502 U.S. 105, 116 (1991)).

[67] *Id.* at 388.

[68] *See, e.g.*, Maryland v. Sheldon, 629 A.2d 753, 760-61 (Md. 1993); New Jersey v. Vawter, 642 A.2d 349, 357-59 (N.J. 1994).

[69] 505 U.S. at 388.

A second exception to the general rule that content-based regulations are prohibited, Justice Scalia wrote, is when speech is associated with particular secondary effects caused by the speech, so that the regulation is justified without reference to the content of the speech but to control the secondary effects.[72] For example, he wrote, a state could permit all obscene live performances except those involving minors. The purpose of the regulation would be the secondary effect or protecting minors. In addition, he wrote, a particular content-based subcategory of a proscribable class of speech can sometimes be swept up incidentally within the reach of a statute directed at conduct rather than at speech.[73]

Finally, Justice Scalia wrote that an exception to the general rule that content-based regulations are unconstitutional occurs when "there is no realistic possibility that official suppression of ideas is afoot." As a result, "[T]he regulation of 'fighting words,' like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone."[74]

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 389.

[73] *Id.*

[74] *Id.* at 390.

The effect of the opinion and the exceptions is that subsets of proscribable categories of speech cannot be proscribed on the basis of content.

Justice Scalia then applied those principles to the St. Paul ordinance and found it unconstitutional because it discriminated against certain groups of people, even though it may have been narrowly construed by the Minnesota Supreme Court. In short, it did not fit any of the exceptions. Wrote Justice Scalia:

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.[75]

The St. Paul ordinance, Scalia wrote, is not aimed at certain groups, but rather at certain messages that are aimed at those groups.[76] It is the obligation of the government, Scalia wrote, to confront hatred based on virulent notions of racial supremacy, "[B]ut the manner of that confrontation cannot consist of selective limitations upon speech. . . . The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[77]

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[75] *Id.* at 391.

[76] *Id.* at 392.

[77] *Id.*

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Fighting words are prohibited, Scalia noted, not because of any particular ideas they convey, but because their content embodies a particularly intolerable mode of expressing ideas. St. Paul, he wrote, has not singled out an especially offensive mode of expression – such as threats – but has proscribed language that communicates messages of racial, gender or religious intolerance. "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas," he wrote. "That possibility would alone be enough to render the ordinance presumptively invalid."[78]

A "Transparently Wrong" Opinion

Four justices – though agreeing that R.A.V.'s conviction should be overturned – took issue with the majority for "cast[ing] aside long-established First Amendment doctrine without the benefit of briefing and adopt[ing] an untried theory. This is hardly a judicious way of proceeding," Justice Byron White wrote in an opinion concurring in the judgment, "and the Court's reasoning in reaching its result is transparently wrong."[79] The Court, wrote Justice White, joined by Justices Harry Blackmun, Sandra Day O'Connor and John Paul Stevens, should have found the St. Paul ordinance fatally overbroad because it criminalizes not only unprotected expression but protected expression as well.[80] Instead, he wrote, the Court "holds the ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court, a ground that requires serious departures from the teaching of prior cases. . . ."[81]

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[78] *Id.* at 393-94.

[79] *Id.* at 398 (White, J., concurring in judgment).

[80] *Id.* at 397 (White, J., concurring in judgment).

Justice White criticized Justice Scalia for abandoning the categorical approach to free speech jurisprudence. The Court, he wrote, has "plainly stated that expression falling within certain limited categories"[82] is not protected by the First Amendment because the expressive content "is worthless or of de minimis value to society."[83] The *R.A.V.* Court, however, Justice White wrote, "announces that earlier Courts did not mean their repeated statements that certain categories of expression are 'not within the area of constitutionally protected speech.'"[84] But, he added, "To the contrary, those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence."[85]

Justice White wrote that it was inconsistent to hold that the government could proscribe an entire category of speech because of its content, but could not treat a subset of that category differently without violating the First Amendment. "[T]he content of the subset," he wrote, "is by definition worthless and undeserving of constitutional protection."[86] The implication in the majority opinion that fighting words could be categorized as a form of debate particularly rankled Justice White. By so categorizing, he wrote, "[T]he majority legitimates hate speech as a form of public discussion."[87]

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[81] *Id.* at 398 (citing Burson v. Freeman, 504 U.S. 191 (1992)) (White, J., concurring in judgment).

[82] *Id.* at 399 (White, J., concurring in judgment).

[83] *Id.* at 400 (White, J., concurring in judgment).

[84] *Id.* (quoting Roth v. United States, 354 U.S. 476, 483 (1957)) (White, J., concurring in judgment).

[85] *Id.* (White, J., concurring in judgment).

[86] *Id.* at 401 (White, J., concurring in judgment).

[87] *Id.* at 402 (White, J., concurring in judgment).

Justice White also criticized the majority for what he called "a general renunciation of strict scrutiny review," which he called "a fundamental tool of First Amendment analysis."[88] And the Court provided no reasoned basis for discarding strict scrutiny analysis in *R.A.V.*[89] The St. Paul ordinance, Justice White wrote, if it were not overbroad, would certainly pass such review. It proscribes a subset of fighting words – those that injure on the basis of race, color, creed, religion or gender, an interest even the majority concedes is compelling[90] – and the ban is on "a class of speech that conveys an overriding message of personal injury and imminent violence."[91]

Justice White wrote that the case should be settled on grounds that the ordinance is overbroad,[92] because it reaches categories of speech that are constitutionally protected.[93]

Justices Blackmun and Stevens also wrote opinions concurring in the judgment.

Justice Blackmun, writing alone, was not as passionate as Justice White, but was just as condemning. "The majority opinion signals one of two possibilities," he wrote. "It will serve as precedent for future cases, or it will not. Either result is disheartening."[94] The majority opinion, he wrote, abandons the categorical approach to restricting speech and relaxes the level of scrutiny applicable to content-based laws, "setting law and logic on their heels." This weakens the traditional protections of speech, because, "If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech."[95]

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[88] *Id.* at 404 (White, J., concurring in judgment). Justice White pointed out that two of the five justices who joined Justice Scalia's opinion had also joined the plurality opinion in *Burson v. Freeman,* 504 U.S. 191 (1992), handed down shortly before *R.A.V.*, and which affirmed the strict scrutiny standard applied in a case involving a First Amendment challenge to a content-based statute. *Id.* at 398 (citing *Burson,* 504 U.S. 198).

[89] *Id.* at 406 (White, J., concurring in judgment).

[90] *Id.* at 407 (White, J., concurring in judgment).

[91] *Id.* at 408 (White, J., concurring in judgment).

[92] *Id.* at 411 (White, J., concurring in judgment).

[93] *Id.* at 413 (White, J., concurring in judgment).

[94] *Id.* at 415 (Blackmun, J., concurring in judgment).

Second, the case may be viewed as an aberration – "a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words."[96] The Court, Blackmun wrote, may have been distracted from its proper mission by the temptation to decide the issue over "politically correct speech" and "cultural diversity," neither question of which was presented. "If this is the meaning of today's opinion," he wrote, "it is perhaps even more regrettable."[97] Concluded Justice Blackmun:

> I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community. I concur in the judgment, however, because. . . this particular ordinance reaches beyond fighting words to speech protected by the First Amendment.[98]

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[95] *Id.* (Blackmun, J., concurring in judgment).

[96] *Id.* (Blackmun, J., concurring in judgment).

[97] *Id.* at 415-16 (Blackmun, J., concurring in judgment).

[98] *Id.* at 416 (Blackmun, J., concurring in judgment).

Justice Stevens, joined in part by Justices White and Blackmun, took issue with the opinions of both Justice Scalia and Justice White. Justice Stevens wrote that threatening a person because of the person's race or religious beliefs could be punished for the trauma it causes, just as lighting a fire near an ammunition dump could be punished.[99] And, agreeing with Justice White, he wrote that the St. Paul ordinance was unconstitutional because it is overbroad.[100] But, he added, he was writing separately "to suggest how the allure of absolute principles has skewed the analysis of both the majority and Justice White's opinions."[101]

Justice Stevens indicated that the majority's fatal flaw is that its central premise – that content-based regulations are presumptively invalid – "has simplistic appeal, but lacks support in our First Amendment jurisprudence."[102] While the Court has often stated that premise, the Court has also recognized that a number of types of speech can be restricted based on their content – obscenity, child pornography and fighting words, for example.[103] The Court, then, disregards a "vast body of case law" and applies a new type of "prohibition on content-based regulation to speech that the Court had until today considered wholly 'unprotected' by the First Amendment – namely, fighting words. This new absolutism in the prohibition of content-based regulations severely contorts the fabric of settled First Amendment law."[104]

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[99] *Id.* at 417 (Stevens, J., concurring in judgment).

[100] *Id.* (Stevens, J., concurring in judgement).

[101] *Id.* (Stevens, J., concurring in judgement).

[102] *Id.* at 425 (Stevens, J., concurring in judgement).

[103] *Id.* at 421 (Stevens, J., concurring in judgement).

[104] *Id.* at 422 (Stevens, J., concurring in judgement).

Justice Stevens also wrote that he had problems with the "categorical approach" advocated by Justice White. While the approach has some appeal – "the categories create safe harbors for governments and speakers alike" – it "sacrifices subtlety for clarity and is, I am convinced, ultimately unsound."[105] Therefore, Justice Stevens wrote, "Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike Justice White, I do not believe that fighting words are wholly unprotected by the First Amendment."[106] The decisions of the Court, he wrote, "establish a more complex and subtle analysis. . . that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech."[107] Under such an approach, he concluded, a selective, subject-matter regulation, like that of St. Paul, is constitutional.[108]

Justice Stevens wrote that he assumes, as does the Court, that the St. Paul ordinance regulates only fighting words.[109] It regulates speech, not on the basis of its subject matter or viewpoint, but rather on the basis of the harm it causes, that is, speech that the speaker knows will inflict injury.[110] The ordinance, therefore, resembles a law prohibiting child pornography, an ordinance regulating speech because of the harm it could cause.[111]

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[105] *Id.* at 426 (Stevens, J., concurring in judgement).

[106] *Id.* at 428 (Stevens, J., concurring in judgement).

[107] *Id.* (Stevens, J., concurring in judgement).

[108] *Id.* (Stevens, J., concurring in judgement).

[109] *Id.* at 430 (Stevens, J., concurring in judgement).

[110] *Id.* at 433 (Stevens, J., concurring in judgement).

[111] *Id.* at 434 (Stevens, J., concurring in judgement).

But, Justice Stevens wrote, even if the ordinance regulated fighting words based on their subject matter, it would be constitutional.[112] The ordinance does not prohibit advocates of tolerance and advocates of intolerance from "hurling fighting words at the other on the basis of their conflicting ideas," but on the basis of the target's race, color, creed, religion or gender. In effect, it prohibits "below the belt" punches, favoring neither side.[113] The ordinance is also narrow and does not raise the specter that the government might "drive certain ideas or viewpoints from the marketplace."[114]

In sum, Justice Stevens wrote, the ordinance would be constitutional were it not overbroad.[115]

CROSS BURNING IN LOWER APPELLATE COURTS

Both the United States government and various states continued to punish cross burning despite the Court's decision in *R.A.V.*, but by use of different approaches. Most states enforce statutes that, to one degree or another, prohibit the act of burning a cross. The federal government, on the other hand, punishes cross burning as part of a broader attempt by a criminal perpetrator to restrict an individual's civil rights, specifically, the right to inhabit a dwelling free from fear due to threatening behavior.[116]

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[112] *Id.* (Stevens, J., concurring in judgement).

[113] *Id.* at 435 (Stevens, J., concurring in judgement).

[114] *Id.* at 436 (Stevens, J., concurring in judgement).

[115] *Id.* (Stevens, J., concurring in judgement).

[116] The prosecutions are generally based upon alleged violations of, among other statutes, 18 U.S.C. § 241 (prohibiting conspiracies to injure, oppress, threaten or intimidate a person who is attempting to exercise that person's rights), 18 U.S.C. § 844(h)(1) (prohibiting the use of fire or explosives in the commission of a felony) and 42 U.S.C. § 3631(a) (prohibiting the interference with the right of a person to purchase, rent or occupy a dwelling because of the person's race).

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Federal Prosecutions for Cross Burning

The federal government has clearly been more successful in prosecuting defendants who burned crosses as part of protests than have state governments. Of five cases prosecuted for violation of various civil rights or fair housing laws, in only one did a federal appellate court overturn a conviction, and in that case the court left the door open for a retrial based on the cross burning.[117] In *Lee v. United States,*[118] the United States Court of Appeals for the Eighth Circuit affirmed a conviction for conspiracy, but reversed a conviction for using fire in the commission of a felony. The court, which had affirmed similar convictions in other cases,[119] provided a framework whereby a conviction of Bruce Roy Lee could be affirmed. Had the judge instructed the jury that expression could be punished if it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," and if the jury had convicted under that standard, the conviction could be affirmed.[120] The court held that Lee's action could be interpreted as an action designed to advocate the use of force or violence and was likely to produce such a result.[121]

The four other cross-burning convictions that reached the federal appellate courts since *R.A.V.* were much more clear-cut.[122]

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[117] The four cases in which convictions were upheld were United States v. Stewart, 65 F.3d 918 (11th Cir. 1995); United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994); United States v. McDermott, 29 F.3d 404 (8th Cir. 1994); United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993). *See* discussion accompanying *infra* notes 123-45.

[118] 6 F.3d 1297 (8th Cir. 1993).

[119] *See* cases cited at *supra* note 117.

[120] 6 F.3d at 1302 (citing Brandenburg v. Ohio, 395 U.S. 444, 448 (1969)).

[121] *Id.* at 1303.

[122] At least two other cases in which defendants were charged with similar crimes reached federal appellate courts but are not considered here. In *Munger v. United States,* 827 F. Supp. 100 (N.D.N.Y. 1992), a

In two cases, defendants were charged with interference with the housing rights of another and use of fire in commission of a federal felony.[123] In *United States v. Hayward,*[124] the Seventh U.S. Circuit Court of Appeals found the purpose of the law was "to protect the right of an individual to associate freely in his home with anyone, regardless of race."[125] The law, therefore, is aimed at prohibiting intimidating acts, not at prohibiting expressive conduct.[126] The fact that the defendants may have used expressive conduct to achieve the goal of intimidation does not bring the action within the protection of the First Amendment under *R.A.V.*, the court held.[127] The defendants, in the middle of the night, had burned two crosses in the yard of a white family, apparently because members of the family frequently had black guests in the home.[128] Applying the

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criminal defendant burned a cross as part of what the court called a "terroristic and racially motivated assault." *Id.* at 105. In that case, however, the defendant was charged with interference with housing rights and assault. The court held that the case was not a cross-burning case: "That petitioner chose to burn a cross during his terroristic and racially motivated assault on the victim offers him no protection from the force of the statute." *Id.* The nature of the defendant's criminal conduct, the court held, was not addressed in *R.A.V. Id.* at 105-06. *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001), was a cross-burning case, but the defendant did not appeal on First Amendment grounds. Michael B. Magleby appealed on various procedural grounds, including the argument that the government could not prove that his burning of a cross in the yard of a racially mixed couple was done with the requisite requirement that his action was racially motivated. *Id.* at 1312-13. Magleby argued that he abandoned his attempt to burn the cross in the yard of his initial victim when too many people were gathered at that home, and he only burned the cross in the yard of the second victim on the guidance of one of his co-defendants. *Id.* at 1309. He did not know the race of the eventual victims, he argued, so the government could not meet its burden of proof. *Id.* at 1312. The court disagreed, finding sufficient evidence to permit a jury to find beyond a reasonable doubt that Magleby targeted the eventual victims because of their race. *Id.* at 1313.

[123] In addition to the First Amendment challenge, the court, in one case, rejected arguments by counsel for the defendants that the statute prohibiting the use of fire in the commission of a felony was limited to the prosecution of arson cases. United States v. Hawyard, 6 F.3d 1241, 1246 (7th Cir. 1993). The court found nothing in the language to so limit the statute. *Id.*

[124] 6 F.3d 1241 (7th Cir. 1993).

[125] *Id.* at 1250.

[126] *Id.*

[127] *Id.* at 1251.

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[128] *Id.* at 1244.

intermediate scrutiny test enunciated in *United States v. O'Brien,*[129] the court held that "[T]he incidental restrictions on the alleged First Amendment rights in this case are no greater than is necessary to further the government's valid interest of protecting the rights" of individuals to associated freely with whomever they choose.[130]

The Eleventh U.S. Circuit Court of Appeals reached a similar conclusion two years later. In *United States v. Stewart,*[131] the court found the statutes under which the defendants were convicted to be facially valid and neither overbroad nor vague.[132] In addition, the court found that the conduct was not protected under *R.A.V.*[133] The defendants had burned a cross in the yard of Linda and Isaiah Ruffin, a black couple with two young daughters, who had recently moved into a nearly all-white community.[134] During the incident, which took place in the middle of the night, there was also an altercation between Isaiah Ruffin and the defendants.[135] Therefore, the court noted, the cross burning was more than an act of expression:

> The act of burning the cross. . . was an expression of the defendant's hatred of blacks, just as the act of killing is sometimes an expression of a murder's hatred of the victim. Because we punish the act and not the opinion or belief which

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[129] 391 U.S. 367, 377 (1968) (Is the regulation within the constitutional power of the government, does it further an important or substantial governmental interest, is the interest unrelated to the suppression of free expression, is the incidental restriction on First Amendment freedoms no greater than essential to further the governmental interest?).

[130] 6 F.3d at 1251.

[131] 65 F.3d 918 (11th Cir. 1995).

[132] *Id.* at 929.

[133] *Id.* at 929-30.

[134] *Id.* at 921.

[135] *Id.* at 921-22.

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> motivated it, the cross burning in this case was not protected by the First Amendment, just as a murder would not have been protected in similar circumstances. Notwithstanding the fact that some Klan cross burnings may constitute protected expression, these defendants did not burn their cross simply to make a political statement. The evidence clearly shows that the defendants intended to threaten and intimidate the Ruffins with this cross burning.[136]

The law's requirement that there must be an intent to intimidate — as there was in this case — insulates the statute from constitutional challenge, the court held.[137]

Two more cases, both out of the Eighth U.S. Circuit Court of Appeals and one involving the same juvenile whose conviction was overturned in *R.A.V.*, further demonstrate the federal government's success in prosecuting defendants who burned crosses. R.A.V. and two other juveniles were convicted of violating laws prohibiting the interference with federal housing rights by burning crosses in the yards of three families.[138] The Eighth Circuit held that the critical issue in the case was whether the cross burnings "were intended as threats, rather than as merely obnoxious, but protected, political statements."[139] The court held that they were[140] and, therefore, "[E]ven though these acts may have expressive content, the First Amendment does not shield them from prosecution."[141]

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[136] *Id.* at 930.

[137] *Id.*

[138] United States v. J.H.H., 22 F.3d 821, 823 (8th Cir. 1994).

[139] *Id.* at 826.

[140] *Id.* at 828.

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Similarly, in *United States v. McDermott,*[142] the Eighth Circuit affirmed the convictions of two defendants who culminated eighteen months of wielding baseball bats, axe handles and knives, throwing rocks and bottles, veering cars toward and chasing black persons by burning a fifteen-foot cross.[143] The court held that the cross burning by William and Daniel McDermott was "merely the final act" in a "threatening course of conduct,"[144] and, therefore, that the jury did not base its conviction solely on that act.[145]

State Prosecutions for Cross Burning

State officials have had considerably less success prosecuting cross burning. Between *R.A.V.* and *Virginia v. Black,* six state courts have ruled in cross-burning cases.[146] Supreme courts in New Jersey[147] and South Carolina[148] and the court of appeals in Maryland[149] overruled convictions because cross burning was determined to be a form of protected speech. Only two appellate courts — in California[150] and Florida[151] — have held cross-burning statutes to be constitutional. One of the earliest cases, ***Washington v. Talley***,[152] might demonstrate the split personality with which most cross-burning cases are imbued.

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[141] *Id.*

[142] 29 F.3d 404 (8th Cir. 1994).

[143] *Id.* at 405.

[144] *Id.* at 407.

[145] *Id.* at 408.

[146] In addition to New Jersey, South Carolina, Maryland, California, Florida and Washington, *see infra* notes 147-52, county courts in Pennsylania split, one ruling that cross burning is not a threat, Commonwealth v. Kozak, 21 Pa. D. & C. 4th 363 (Allegheny County, 1993), the other ruling that cross burning is not protected expression, Commonwealth v. Lower, 2 Pa. D. & C. 4th 107 (Cargon County, 1989).

[147] New Jersey v. Vawter, 642 A.2d 349 (N.J. 1994).

[148] State v. Ramsey, 430 S.E.2d 511 (S.C. 1993).

[149] Maryland v. Sheldon, 629 A.2d 753 (Md. 1993).

[150] In re Steven S., 31 Cal. Rptr. 2d 644 (Cal. Ct. App. 1994).

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In *Washington*, the state supreme court consolidated two cases. In the first, David Talley was convicted of six counts of malicious harassment in connection with activities he conducted in his yard. He built a four-foot cross, set it afire and began to "hoot and holler."[153] The activity apparently frightened off a mixed-race couple who was planning to purchase the house next door to Talley's.[154] In the second case, Daniel Myers, Brandon Stevens and several other teenagers burned an eight-foot cross in the yard of a black schoolmate who they said was acting "too cool" at school. They were charged with one count of malicious harassment.[155] All three defendants challenged the convictions on grounds that the malicious harassment statute was unconstitutional.[156]

The defendants were convicted under two sections of Washington's malicious harassment statute. Section 1 prohibited actions that, based upon a person's race, color, religion, ancestry, national original or handicap, caused physical injury or placed a person in fear of injury because of a variety of actions, including cross burning. Section 2 provided that cross burning constituted a *per se* violation of the law.[157] The state supreme court held that Section 1 of the law withstood constitutional scrutiny because it

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[151] Florida v. T.B.D., 656 So. 2d 479 (Fla. Ct. App. 1995).

[152] 858 P.2d 217 (Wash. 1993).

[153] *Id.* at 220.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* at 220-21 (citing WASH. REV. CODE § 9A.36.080 (West 1989)).

is aimed at criminal conduct and only incidentally affects speech, but that Section 2 was unconstitutionally overbroad because it inhibited free speech on the basis of content.[158]

Section 1, the court held, differed from the St. Paul ordinance because it "is aimed at criminal conduct and enhances punishment for that conduct where the defendant chooses his or her victim because of their perceived membership in a protected category."[159] The statute, the court noted, is triggered by victim selection regardless of the actor's motives or beliefs.[160] The second section of the law, however, is unconstitutional because it "criminalizes symbolic speech that expresses disfavored viewpoints in an especially offensive manner."[161] Even if the law was construed to address only fighting words, the court held, it would still be unconstitutional "because even fighting words may not be regulated based on their content."[162]

Many of the themes arising in *Washington* also appeared in the other cross-burning cases. The cases, then, turned, not on different issues, but on the way courts interpreted the law as it applied to those issues. Cases did not turn, for example, on where the cross burning occurred. Four of the state statutes prohibited cross burning on the property of another unless the burner had the permission of the property owner. Courts split on the constitutionality of the statutes, without reference to this particular provision.[163] Nor did cases turn on whether cross burning was expressive conduct that conveyed a powerful message. The courts were in relative agreement that cross burnings convey powerful, even repugnant messages.[164] Such actions, the New Jersey Supreme Court noted, convey a clear message: "hatred, hostility, and animosity."[165]

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[158] *Id.* at 221.

[159] *Id.* at 222.

[160] *Id.*

[161] *Id.* at 231.

[162] *Id.*

[163] *Compare* Maryland v. Sheldon, 629 A.2d 753, 755-56 (Md. 1993), and State v. Ramsey, 430 S.E.2d 511, 513 (S.C. 1993), *with* Florida v. T.B.D., 656 So. 2d 479, 480 (Fla. Ct. App. 1995), and In re Steven S., 31 Cal. Rptr. 2d 644, 646 (Cal. Ct. App. 1994).

From there, however, there was clear divergence on the part of the state courts as to how cross burning and cross-burning statutes should be interpreted.

Courts holding cross-burning statutes to be constitutional did so because the messages conveyed were found to be more than expression — they were determined to be conduct, that is, threats. The Florida Court of Appeals, for example, held:

> An unauthorized cross-burning by intruders in one's own yard constitutes a direct affront to one's privacy and security and has been inextricably linked in this state's history to sudden and precipitous violence — lynchings, shootings, whippings, mutilations, and home-burnings. The connection between a flaming cross in the yard and forthcoming violence is clear and direct. A more terrifying symbolic threat for many Floridians would be difficult to imagine.[166]

The California Court of Appeals agreed. A cross burning, the court held, "does more than convey a message. It inflicts immediate injury by subjecting the victim to fear and intimidation, and it conveys a threat of future physical harm."[167] Indeed, the California court found cross burning to fall into the category of speech known as "true threats."[168] The California Court of Appeals found a "true threat" to occur "when a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily harm"[169] a definition with which the Supreme Court would seem to agree.[170] In *Watts v. United States,* the Court quoted with approval a lower court definition of threats as voluntary utterances charged "with 'an apparent determination to carry them into execution.'"[171]

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[164] *See, e.g., Maryland,* 629 A.2d at 757.

[165] New Jersey v. Vawter, 642 A.2d 349, 354 (N.J. 1994). *See also id.*; State v. Ramsey, 430 S.E.2d 511, 514 (S.C. 1993).

[166] Florida v. T.B.D., 656 So. 2d 479, 481 (Fla. Ct. App. 1995).

[167] In re Steven S., 31 Cal. Rptr. 2d 644, 647 (Cal. Ct. App. 1994).

New Jersey law also prohibits actions that constitute threats, but the state supreme court held that the law did not prohibit only threats; the law also proscribed "expressions of contempt and hatred,"[172] expressions that, while contemptible, are protected.

Florida[173] and California[174] found cross burning to fall under the category of "fighting words." In doing so, the California Court of Appeals called upon the language from *Chaplinsky* proscribing words that inflict injury. "The typical act of malicious cross burning is not done in the victim's immediate physical presence and thus does not tend to incite an immediate fight," the court held.[175] But, the court added, "the fighting words doctrine encompasses expressive conduct that by its very commission inflicts injury."[176]

Of the courts finding cross burning statutes to be unconstitutional, only the South

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[168] *Id.* In *Watts v. United States,* 394 U.S. 705, 707 (1969), the Supreme Court noted that a threat against the president is not protected expression because it is, in fact, a threat. *See infra* notes 216-23 and accompanying discussion.

[169] *Id.* at 647.

[170] *See infra* notes 171, 217-24 and accompanying discussion.

[171] 394 U.S. at 707 (quoting Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918)).

[172] New Jersey v. Vawter, 642 A.2d 349, 359 (N.J. 1994).

[173] *See* Florida v. T.B.D., 656 So. 2d 479, 481 (Fla. Ct. App. 1995).

[174] *See* In re Steven S., 31 Cal. Rptr. 2d 644, 648 (Cal. Ct. App. 1994).

[175] *Id.* at 648.

[176] *Id.*

Carolina Supreme Court addressed the fighting words issue, and that court held that the statute in question was discriminatory — like that of St. Paul — because it did not prohibit the use of fighting words, but only "the use of those fighting words symbolically conveyed by a burning cross."[177] Though Florida's cross-burning statute contained language that was virtually identical to that of South Carolina, that state's supreme court found the statute to be content neutral because it was not limited to any favored topics.[178] In addition, the Florida court found that the cross-burning statute was not overbroad.[179]

In both Maryland[180] and New Jersey,[181] appellate courts found the cross-burning statutes did not survive strict scrutiny. In addition, each court examined the respective state law against the three exceptions supposedly advanced by Justice Scalia in *R.A.V.*, and found that the law did not meet any of the exceptions.

The New Jersey Supreme Court found that the state's cross-burning law suffered from the same deficiencies as the ordinance struck down in *R.A.V.*[182]

The Maryland Court of Appeals found cross burning to be odious and cowardly, but, nevertheless, expressive conduct.[183] In addition, since there was no way to justify

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[177] State v. Ramsey, 430 S.E.2d 511, 514 (S.C. 1993).

[178] The South Carolina statute prohibits the placing of "a burning or flaming cross" or any exhibit containing such a cross, real or simulated without the permission of the property owner. *Id.* at 513 n.1 (quoting S.C.Code Ann. § 17-7-120 (Law. Co-op. 1985)). The Florida statute makes it unlawful for anyone "to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission" of the property owner or resident. *Florida*, 656 So. 2d at 480 (quoting Fla. Stat. Ann. § 176.18 (1993)).

[179] 656 So. 2d at 482.

[180] *See* Maryland v. Sheldon, 629 A.2d 753, 762-63 (Md. 1993).

[181] *See* New Jersey v. Vawter, 642 A.2d 349, 359-60 (N.J. 1994).

[182] *Id.* at 359-60.

[183] 629 A.2d at 758.

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the cross-burning statute "without referring to the substance of speech it regulates," the statute was not content-neutral and was subject to strict scrutiny.[184] The statute, the court held, is not necessary to serve the state's asserted interest.[185] While protecting the social welfare of its citizens is a compelling state interest, the court held, "[T]he Constitution does not allow the unnecessary trammeling of free expression even for the noblest of purposes," and the cross-burning law "cannot be deemed 'necessary' to the State's effort to foster racial and religious accord."[186]

Before either state addressed the issue of strict scrutiny, however, each applied the three exceptions to the prohibition against content discrimination delineated by Scalia and held that the exceptions did not apply. Both did so reluctantly. The New Jersey high court specifically criticized the holding: "Although we are frank to confess that our reasoning in that case would have differed from Justice Scalia's, we recognize our inflexible obligation to review the constitutionality of our own statutes using his premises."[187]

The New Jersey Supreme Court held that the state laws in question did not fit into any of the three exceptions delineate by Justice Scalia in *R.A.V.*[188] First, they did not prohibit only threats, but also prohibited expressions of contempt and hatred — expressions that might be obnoxious, but are not illegal. And they suffered from the same deficiencies as *R.A.V.*[189] Second, whatever secondary effects the laws might target were the same as those targeted by *R.A.V.*, so the laws suffered from the same deficiencies as the St. Paul ordinance.[190] Finally, the legislative history of the laws indicates that they were passed specifically to outlaw messages of religious or racial hatred, so the argument that no official suppression of ideas is afoot cannot survive.[191]

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[184] *Id.* at 759.

[185] *Id.* at 762.

[186] *Id.* at 763.

[187] 642 A.2d at 358.

[188] *See* R.A.V. v. St. Paul, 505 U.S. 333, 388-90 (1992). *See also supra* notes 69-74 and accompanying text.

The Maryland Court of Appeals went through a similar machination, arriving at the same conclusion.[192]

VIRGINIA v. BLACK

The Virginia Supreme Court consolidated three cases for decision in *Black v. Commonwealth*.[193] *Elliott v. Commonwealth* and *O'Mara v. Commonwealth*[194] grew out of an incident involving the burning of a cross in the yard of David Targee, a neighbor of Richard J. Elliott, May 2, 1998. At a party, Elliott apparently complained about a disagreement between himself and Targee and suggested that a cross be burned in Targee's yard in retaliation.[195] Elliott was convicted of attempted cross burning, was sentenced to ninety days in jail and was fined $2,500.[196] Jonathan O'Mara pleaded guilty to attempted cross burning and conspiracy to commit cross burning and received the same sentence.[197] Both men appealed, and both convictions were upheld by the Virginia Court of Appeals.[198]

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[189] 642 A.2d at 359.

[190] *Id.*

[191] *Id.*

[192] 629 A.2d at 760-61.

[193] 553 S.E.2d 738 (Va. 2001).

[194] 535 S.E.2d 175 (Va. App. 2000).

[195] 553 S.E.2d at 740.

[196] *Id.* at 741.

The case involving Barry Elton Black arose from a Ku Klux Klan rally August 22, 1998, in Carroll County, Virginia. The cross was burned in an open field that belonged to Annabell Sechrist, who participated in the rally. Though the property on which the cross was burned was private, it was visible from a public highway and from nearby homes.[199] Black was convicted of violating Virginia's cross-burning statute and was fined $2,500. His conviction was also affirmed.[200]

The statute the three men were convicted of violating prohibited "any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place."[201] The law also provided that "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."[202]

Black argued that the statute was unconstitutional because it engaged in viewpoint and content discrimination. He also contended that the provision that permitted the inference of an intent to intimidate from the act of burning a cross excused the state from its burden of proving a prima facie case.[203]

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[197] *Id.* at 740.

[198] 535 S.E.2d at 181.

[199] 553 S.E.2d at 748 (Hassell, J., dissenting).

[200] *Id.* at 741.

[201] VA. CODE ANN. § 18.2-423 (Michie 1983). The law has been changed. In its 2002 term, the Virginia General Assembly amended the law so that it is now a crime for a person to burn any object, regardless of shape, on the property of another person without permission or to burn any object "on a highway or other public place in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury." VA. CODE ANN. § 18.2-423.01 (Michie 2002).

[202] *Id.*

[203] 553 S.E.2d at 741.

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The Virginia Supreme Court Ruling

The Virginia Supreme Court found *R.A.V.* controlling. The Virginia statute, the court held, was "analytically indistinguishable" from the St. Paul ordinance.[204] The state's argument that the Virginia statute was constitutional because it did not discriminate, as did the St. Paul statute, and because the *R.A.V.* Court noted that threats of violence are outside First Amendment protection "distorts the holding of *R.A.V.*," the court held.[205] A statute punishing intimidation or threats based solely upon a content-focused category – such as race or religion – of otherwise protected speech, the court held, violates the First Amendment.[206] The court quoted heavily from those portions of *R.A.V.* in which Justice Scalia described the categories and sub-categories of speech that might be protected[207] – the portions of the opinion with which Justice White took particular exception.[208] "*R.A.V.* makes it abundantly clear that, while certain areas of speech and expressive conduct may be subject to proscription, regulation within these areas must not discriminate based upon the content of the message,"[209] wrote Judge Donald W. Lemons for the majority.

The absence of language referring to race does not save the statute, the court held: "The virulent symbolism of cross burning has been discussed in so many judicial opinions that its subject and content as symbolic speech has been universally acknowledged," and those who burn crosses, "do so fully cognizant of the controversial racial and religious messages which such acts impart."[210] In addition, the court noted, the

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[204] *Id.* at 742.

[205] *Id.* at 743.

[206] *Id.*

[207] *Id.*

[208] *See* discussion accompanying *supra* notes 82-85.

[209] 553 S.E.2d at 743.

[210] *Id.* at 744.

Virginia statute was aimed specifically at regulating content rather than any secondary effects that cross burning might cause.[211]

The Virginia Supreme Court then turned to Justice White's opinion concurring in the judgment to find the state law overbroad. Using White's opinion as a basis, the court found the state law "sweeps within its ambit for arrest and prosecution, both protected and unprotected speech" and, therefore, is unconstitutionally overbroad.[212]

Three judges dissented, complaining that the state has the authority to punish an act "that intentionally places another person in fear of bodily harm," as cross burning does.[213]

In a concurring opinion written solely to respond to the dissent, however, Judge Cynthia D. Kinser wrote that the dissent was mistaken in its efforts to equate "an intent to intimidate" with a true threat or a "physical act intended to inflict bodily harm."[214] Even if the dissent were correct in its assertion that the Virginia statute proscribes only conduct that constitutes true threats, the state still "cannot engage in content discrimination by selectively prohibiting only those 'true threats' that convey a particular message."[215]

Before the U.S. Supreme Court

A common thread running through the cross-burning cases — and through briefs filed in *Black* and oral arguments, as well — is the issue of intimidation. Virginia, supported by at least six amicus briefs, including one from the Solicitor General of the

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[211] *Id.* at 745.

[212] *Id.* at 746.

[213] *Id.* at 748 (Hassell, J., dissenting) (joined by Carrico, C.J., Koontz, J.). As a point of interest, Judge Hassell became the first African American chief justice of the Virginia Supreme Court on Feb. 11, 2003. *See* Alan Cooper, *Hassell Sworn in as Chief Justice; Historic Moment at Supreme Court*, RICHMOND TIMES-DISPATCH, Feb. 12, 2003, at A1.

[214] *Id.* at 747 (Kinser, J., concurring).

[215] *Id.* (Kinser, J., concurring).

United States, took the position that the government has the authority to proscribe intimidating speech. Attorneys for Black, Elliott and O'Mara, on the other hand, along with their amici, argued that cross burning, even if it is intimidating speech, does not rise to a level that would require the serious damage to First Amendment rights that punishing the expressive conduct would cause.

A key question, therefore, it would seem, is how much intimidation is too much for the First Amendment? That is, is there a distinction between language that is intimidating and language that is threatening. The issue surfaced in the briefs filed by both the Commonwealth of Virginia and attorneys for Black, Elliott and O'Mara. Virginia acknowledged that intimidation is different from a threat,[216] but argued that intimidating speech should be regulated.[217] The respondents, however, argued that a key problem with the law is clear: "[W]hile some cross burning may be intimidating, it can't be plausibly argued that every act of cross burning is a threat."[218]

Intimidation, Virginia argued, is different from both threats and fighting words. With an epithet or, the brief implied, a threat, the danger is likely to soon pass. Intimidation is different, the brief noted, even though it then used the word "threat" as a synonym for "intimidation": "A threat to do bodily harm to an individual or his family is likely to sink deep into the psyche of its victim, acquiring more force over time."[219] Intimidations, therefore, should be proscribed.

Virginia also argued that the cross-burning statute is content-neutral because it prohibits an act that can be used to intimidate anyone, not just members of particular groups. "A cross burning — standing alone and without explanation — is understood in our society as a message of intimidation," the brief argued, and can intimidate anyone, regardless of race.[220] Often bigotry is involved, but there is no direct correlation between race and burning a cross.[221]

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[216] Brief of Petitioner at 14, Virginia v. Black, 553 S.E.2d 738 (Va. 2001) (No. 01-1107).

[217] *Id.* at 24.

[218] Brief on Merits for Respondents at 35-36, Virginia v. Black, 553 S.E.2d 738 (Va. 2001) (No. 01-1107).

[219] Brief of Petitioner at 14.

Even if the statute is content-based, Virginia argued, it is justified by the three exceptions delineated in *R.A.V.*: It is a particularly virulent form of intimidation,[222] it has an array of secondary effects,[223] and no official suppression of ideas is afoot.[224]

Virginia "incessantly repeats the mantra" that the state law requires an intent to intimidate, attorneys for Black, Elliott and O'Mara, countered. "But the point of *R.A.V.* is that it does not matter."[225] A law banning fighting words is permissible, but not a law banning racist fighting words. Similarly, a law banning intimidation is permissible if the concept of intimidation is sufficiently confined, but not a law banning intimidation through cross burning. Virginia's argument, the brief argued, "collapses on itself and dissolves into incoherence, for the statute only makes logical sense if it is construed as driven by Virginia's concern with *what is communicated* when a cross is burned."[226] That's because, the brief argued, the law unconstitutionally discriminates on the basis of content and viewpoint.[227] The state's position, the brief argued, is that content and viewpoint discrimination reside only in the language. But such discrimination can also reside in specific symbols:[228]

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[220] *Id.* at 26.

[221] *Id.* at 26-27.

[222] *Id.* at 32-34.

[223] *Id.* at 37-39.

[224] *Id.* at 40-41.

[225] Brief on Merits for Respondents at 11-12.

[226] *Id.* at 12 (emphasis in original).

[227] *Id.* at 6.

[228] *Id.* at 7.

> Certain symbols — the American Flag, the Star of David, the Cross, the swastika — exude powerful magnetic charges, positive and negative, and are often invoked to express beliefs and emotions high and low, sublime and base, from patriotism, faith, or love to dissent, bigotry, or hate.[229]

And the government may not regulate speech on the basis of its message about such symbols, nor is the government allowed to protect certain symbols from attack:

> If the government is permitted to select one symbol for banishment from public discourse there are few limiting principles to prevent it from selecting others. And it is but a short step from the banning of offending symbols such as burning crosses to the banning of offending words.[230]

Virginia can't have it both ways, the brief asserted, by arguing that the violent history of cross burning does not render the statute content and viewpoint based, then calling upon that history to argue that cross burning is equivalent to intimidation because of its history. The state, the brief argued, is "ignoring the history of cross-burning in one part of its argument and invoking it in the next."[231] The pivotal question, therefore, is whether the law's focus is sufficient to render it content and viewpoint based: "And however much Virginia protests, under our First Amendment traditions to single out for special treatment one symbol in this manner *does* pose a danger that suppression of ideas is afoot."[232]

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[229] *Id.* at 8.

[230] *Id.* at 3.

[231] *Id.* at 15.

[232] *Id.* at 37.

Virginia's position, then, was that, even though intimidation is different from threats, intimidation is a more serious form of speech and can be punished under the Constitution. Virginia did not address the issue that the Supreme Court has proscribed true threats, at least when they are aimed at the President, but has allowed threatening language aimed at the President when that language is part of political hyperbole.

Attorneys for Black, Elliott and O'Mara, on the other hand, also distinguishing between threats and intimidation, argued that intimidation that does not rise to the level of threats or fighting words, and is protected under the Constitution.

The attorneys made essentially the same points during oral arguments December 11, 2002. The justices seemed to be intrigued by the nature of cross burning – was it like brandishing an automatic weapon, Justice Antonin Scalia wanted to know,[233] or like telling a person "I'll kill you," Justice Stephen Breyer wanted to know.[234] Indeed, Justice Breyer eventually summed up the key question in the case: "And so the question before us is whether burning a cross is such a terrorizing symbol. . . in American culture that even on the basis of heightened scrutiny, it's okay to proscribe it."[235]

William H. Hurd, Virginia State Solicitor, and Michael R. Dreesben, Deputy U.S. Solicitor General, told the justices, in essence, that cross burning could be proscribed because it is tantamount to a threat. It "is very much like brandishing a firearm," Hurd told Justice Scalia. It is "an especially virulent form of intimidation."[236] Cross burning, he argued, says "[W]e're close at hand. We don't just talk. We act. . . . The message is a threat of bodily harm, and. . . it is unique."[237]

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[233] Transcript of Oral Argument at 7-8, 27, Virginia v. Black, Dec. 11, 2002 (No. 01-1107).

[234] *Id.* at 41.

[235] *Id.* at 37.

[236] *Id.* at 8.

[237] *Id.* at 16.

Dreeben agreed, calling cross burning "a signal to violence or a warning to violence" that is not protected speech.[238] Justice Clarence Thomas went even further in his questioning of Dreeben, wondering aloud whether the attorney was understating the issue. He suggested that cross burning is "significantly greater than intimidation or a threat"[239] because "It was intended to cause fear. . . and to terrorize a population."[240] Dreeben agreed, adding that the focus of the Virginia statute was not on any particular message, but "on the effect of intimidation, and the intent to create a climate of fear and. . . a climate of terror."[241]

University of Richmond law professor Rodney A. Smolla, however, argued that cross burning is significantly different from brandishing a weapon or telling a person, "I'll kill you." Cross burning involved symbolism rather than intimidation, he argued, and was being proscribed because of the message it conveyed rather than any threat.[242] Cross burning, Smolla said, is not a particularly virulent form of intimidation, but, rather, is "an especially virulent form of expression on ideas relating to race, religion, politics."[243] Restrictions on it, therefore, are content-based. "There's not a single interest that society seeks to protect. . . that cannot be vindicated perfectly as well, exactly as well with no fall-off at all by content-neutral alternatives," he argued.[244] "It's important to remember," Smolla added, "that our First Amendment jurisprudence is not just about deliberate censorship and realized censorship. It is also about. . . chilling effect and about. . . breathing space."[245]

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[238] *Id.* at 20

[239] *Id.* at 22.

[240] *Id.* at 23.

[241] *Id.* at 24.

[242] *Id.* at 33.

[243] *Id.* at 31.

[244] *Id.*

[245] *Id.* at 40.

Justice O'Connor for the Court

The decision in *Virginia v. Black* was almost as splintered as that in *R.A.V.* Justice Sandra Day O'Connor, writing for five members of the Court, found that states could proscribe cross burning that was designed to intimidate.[246] Justice O'Connor, in a description of the history of cross burning, wrote that the activity "is inextricably intertwined with the history of the Ku Klux Klan,"[247] but that because the Klan used cross burnings during rally and rituals, it has had a dual purpose: "[C]ross burnings have been used to communicate both threats of violence and messages of shared ideology."[248] Regardless of whether the message is political or intimidating, she wrote, "[T]he burning cross is a 'symbol of hate.'"[249] Therefore, "[W]hile a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful."[250]

Therefore, Justice O'Connor wrote, only cross burning designed to intimidate may be restricted. The First Amendment, she wrote, is designed to protect the free trade in ideas – even ideas that the overwhelming majority of people find distasteful or discomforting. In addition, the First Amendment protects symbolic or expressive conduct as well as actual speech.[251] It does not protect either fighting words or true threats, however. Fighting words, she indicated, are words "'which by their very utterance inflict injury or tend to incite an immediate breach of the peace,'"[252] and threats

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[246] 123 S.Ct. 1536, 1549 (2003).

[247] *Id.* at 1544.

[248] *Id.* at 1545.

[249] *Id.* at 1546.

[250] *Id.* at 1546-47.

[251] *Id.* at 1547.

[252] *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

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"encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'"[253] In addition, the protection from threatening speech extends beyond the intent of the person issuing the threat. "The speaker," Justice O'Connor wrote, "need not actually intend to carry out the threat."[254] People are protected from the fear of violence in addition to being protected from the violence itself.[255]

Therefore, she wrote, First Amendment protection does not extend to intimidating words, which are a form of true threats: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[256] Intimidation, therefore, is designed to produce fear, and it is that production that may be proscribed and punished.

Justice O'Connor then applied *R.A.V.* to the facts of *Virginia v. Black*, and found that Virginia could constitutionally outlaw cross burnings "done with the intent to intimidate. . . ."[257] The Court in *R.A.V.*, Justice O'Connor wrote, specifically held that some types of content discrimination are allowed under the First Amendment. That is, if an "entire class of speech" is proscribable, a jurisdiction may constitutionally decide to proscribe only a subset of that category of speech."[258] Instead of prohibiting all intimidating messages, Virginia has chosen to prohibit only those intimidating messages disseminated by means of the burning cross, and that decision does not violate the

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[253] *Id.* (quoting Watts v. United States, 394 U.S. 705, 708 (1969)).

[254] *Id.* at 1548.

[255] *Id.*

[256] *Id.*

[257] *Id.* at 1549.

[258] *Id.*

Constitution.[259] That is, "[A] State may choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm."[260]

The explanation was important because, in *R.A.V.*, Justice Scalia wrote that subsets of proscribed categories of speech were subject to a separate constitutional determination as to whether they could be proscribed.

Despite that, however, Justice O'Connor found the Virginia law unconstitutional because it provided that any burning of a cross would be prima facie evidence that there was an intent to intimidate. The provision, she wrote, permits a jury to convict defendants in every case in which they exercise their constitutional right not to put on a defense. And, she added, even when a defendant presents a defense, the provision "makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case."[261] In some of those cases, the cross burners may be involved in "core political speech," Justice O'Connor wrote. Even so, the act may arouse a sense of anger or hatred, "But this sense of anger or hatred is not sufficient to ban all cross burnings."[262]

Justice Antonin Scalia, who agreed that states may proscribe cross burnings that constitute intimidating speech, did not join the portion of Justice O'Connor's opinion striking down the law because of the prima facie evidence provision.[263] Justice David Souter, joined by Justices Anthony Kennedy and Ruth Bader Ginsberg, however, also had problems with the prima facie clause, concurring in the judgment but in only part of Justice O'Connor's opinion.[264]

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[259] *Id.*

[260] *Id.* at 1549-50.

[261] *Id.* at 1550.

[262] *Id.*

[263] *Id.* at 1552-59 (Scalia, J., concurring in the judgment in part, dissenting in part).

[264] *Id.* at 1559-62 (Souter, J., concurring in judgment and in part).

Justice Souter, writing that none of the exceptions outlined in *R.A.V.* would save the Virginia law,[265] agreed with Justice O'Connor that "[T]he prima facie evidence provision stands in the way of any finding" that the law is constitutional.[266] The primary effect of the provision, he wrote, would be:

> [T]o skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning. To understand how the provision may work, recall that the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten.[267]

The plurality opinion by Justice O'Connor and the joiner by Justice Souter, therefore, provided seven votes for the proposition that the Virginia law was unconstitutional because of the prima facie evidence provision.

Justice Scalia also concurred in the judgment, but in an opinion that was only slightly less convoluted than his *R.A.V.* majority opinion. Joined by Justice Clarence Thomas, he agreed that the judgment of the Virginia Supreme Court should be vacated, but only so the lower court could "authoritatively construe the prima-facie-evidence provision."[268] Justice Scalia found no constitutional problem with the provision so long as defendants were given the opportunity to rebut the presumption that there was an intent to intimdate.[269]

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[265] *Id.* at 1559-61 (Souter, J., concurring in judgment and in part).

[266] *Id.* at 1661 (Souter, J., concurring in judgment and in part).

[267] *Id.* (Souter, J., concurring in judgment and in part).

[268] *Id.* at 1552 (Scalia, J., concurring in judgment and in part).

[269] *Id.* at 1553-54 (Scalia, J., concurring in judgment and in part).

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Finally, Justice Thomas dissented, writing, in effect, that everyone who considered cross burning a form of speech was wrong; the activity could be banned in all circumstances as threatening conduct.[270]

THREATS, INTIMIDATION OR MALICIOUS MISCHIEF

The Supreme Court has clearly delineated standards for those types of speech that lie outside the protection of the First Amendment. Obscene speech must meet the three-part test first enunciated in *Miller v. California*.[271] Fighting words must tend to cause an immediate breach of the peace.[272] Words constitute true threats when there is a reasonable expectation that the words will prompt immediate action.[273] Advocacy to overthrow the government through violence or to engage in other illegal, violent acts must be specific and imminent.[274] It's not enough for the recipient of such speech to be able to speculate about possible results; the advocacy must be such that it is likely to cause the desired result.[275]

The Court has established these rules of law to ensure that the government not encroach upon valuable free speech rights in the name of controlling obnoxious speech. Speech that is disagreeable, hateful or even intimidating may not be restricted because someone in government doesn't like the nature or content of that speech. Obscenity may be proscribed because it has been determined by the Court to be without redeeming social value. Other forms of speech are proscribed because their value is overridden by the physical response they invoke; only when the speech rises to the level of action or of causing some retaliation may it be banned.

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[270] *Id.* at 1563-69 (Thomas, J., dissenting.)

[271] 413 U.S. 15, 24 (1973) ((a) whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest, (b) whether the work describes in a patently offensive way, sexual conduct specifically defined by applicable state law, (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value).

[272] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

[273] *See* Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam).

[274] *See* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969).

[275] *See id.*

That requirement was first clearly enunciated by Justice Oliver Wendell Holmes, writing for a unanimous Court in *Schenck v. United States*.[276] The clear and present danger test, as later clarified by Justice Holmes, provided that unpopular opinions could not be restricted "unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required. . . ."[277] The requirement continued with the fighting words doctrine enunciated in *Chaplinsky v. New Hampshire*,[278] requiring that words can only be restricted when "by their very utterance [they] inflict injury or tend to incite an immediate breach of the peace,"[279] and with the incitement doctrine of *Brandenburg v. Ohio*,[280] requiring that the results of advocacting illegal action be immediate.[281] Following *Brandenburg*, it was clear that, in order for inflammatory speech to be proscribed, that speech must advocate immediate violent action. Advocacy to "take the fucking streets" was not an incitement, the Court held, because the advocacy was not for immediate action; rather it was for possible action some time in the future.[282] As Justice William O. Douglas wrote in his concurrence in *Brandenburg*:

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[276] 249 U.S. 47, 51 (1919).

[277] Abrams v. United States, 250 U.S. 616, 630-31 (Holmes, J., dissenting). *See also*, W. Wat Hopkins, *Reconsidering the "Clear and Present Danger" Test: Whence the "Marketplace of Ideas"?* 78, *in* FREE SPEECH YEARBOOK (1995).

[278] 315 U.S. 568 (1942)

[279] *Id.* at 572.

[280] 395 U.S. 444 (1969)

[281] *Id.* at 447

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.[283]

Virginia v. Black changed all that. The Court has added intimidation to the family of speech categories that can be proscribed and, in so doing, has charted a new course for First Amendment jurisprudence. Intimidating speech, the Court held "is a type of true threat where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[284] Justice O'Connor also expanded the rationale for proscribing true threats and, with them, intimidation. It is the fear of violence from which the subjects of the intimidating speech are protected, she wrote, not just the violence itself: "The speaker need not actually intend to carry out the threat."[285]

The Court, presumably, will now allow proscription of speech that advocates some possible harm at some possible time in the future – the requirement of imminence is not necessary. If language is intimidating, it seems, the danger no longer need be either clear or present. Few cross burnings in the cases adjudicated by the various state and federal courts, occurred while the burners were present.[286] In most cases, indeed, in *R.A.V.* as well, the burners placed their crosses, ignited them and then retreated. The act of burning a cross in someone's yard, however, is apparently sufficiently imbued with a message that it will cause the inhabitants of the home to become afraid. Under the rule established in *Virginia v. Black,* though the method for putting the rule into operation has yet to be determined, the act may be proscribed and persons violating cross burning laws may be punished.

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[282] Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (per curiam).

[283] *Id.* at 452 (Douglas, J., concurring) (quoting Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting)).

[284] 123 S.Ct. 1536, 1548 (2003).

[285] *Id.*

The rationale for this rule is that cross burning is a particularly virulent form of expression. Ostensibly, cross burning falls within the first exception to the content-discrimination prohibition Justice Scalia enunciated in *R.A.V.*, that is, "when the basis for content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."[287] As a practical matter, however, *Virginia v. Black* constitutes what Justice Blackmun called political correctness.[288] Justice O'Connor and the majority may argue that cross burning constitutes a type of intimidation because of its historical significance,[289] but, in fact, attorney Rodney Smolla was correct when he argued that if the historical import of cross burning is used for justification of regulating that form of expression, the result would be unconstitutional content-based discrimination.[290]

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[286] The exception to this rule occurred when the cross burners took additional actions designed to heighten the intimidation. *See, e.g.*, In re Steven S., 31 Cal. Rptr. 2d 644 (Cal. Ct. App. 1994) (in which the cross burning was part of a series of events initiated by neighbors); Washington v. Talley, 858 P.2d 217 (Wash. 1993) (in which the perpetrator also yelled at the targets of the cross burning).

[287] 505 U.S. 377, 388 (1992).

[288] *Id.* at 415-16 (Blackmun, J., concurring in judgment).

[289] 123 S.Ct. 1536, 1544, 1546 (2003).

[290] Transcript of Oral Arguments at 51. *See also* discussion accompanying *supra* notes 231-32.

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The Court was poised to adopt a rule prohibiting intimidating cross burning in *R.A.V.* That ruling was averted only because the discriminatory nature of the St. Paul ordinance drove the majority in a different direction. Indeed, at least four justices indicated in *R.A.V.* that they were willing to uphold cross burning bans, but could not do so in *R.A.V.* because the ordinance was overbroad. At issue with Justices John Paul Stevens, Byron White, Harry Blackmun and Sandra Day O'Connor was the language targeting conduct that "arouses anger, alarm or resentment in others." Wrote Justice White: "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."[291] Justices Stevens[292] and Blackmun[293] agreed. And with Justice O'Connor, they seemed ready to let stand a cross-burning prohibition that was not overbroad.[294] "I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns," Justice Blackmun wrote.[295] And Justice Stevens added that "a selective, subject-matter regulation on proscribable speech," like that of the St. Paul ordinance, would be constitutional, absence the overbreadth.[296]

The Virginia law, targeting cross burning that is intimidating, fit the bill. The Court is willing to allow Virginia -- and other states – to specify that intimidation by cross burning is illegal without so specifying for intimidation by wielding a bat or an axe or a crow bar. Ostensibly, such activity would be illegal in Virginia, just as intimidation by means of cross burning would be illegal, even in the absence of a law prohibiting the specific activity. In *R.A.V.*, however, the majority held that a political subdivision could specifically carve from a proscribable category of speech, a subcategory for special attention because of the subcategory is particularly heinous, but could only do so after examining the rationale for the proscription under the Constitution. That is, a subcategory of proscribable speech is not automatically proscribable -- there must be a constitutional basis for this content discrimination.[297] The example used by Justice Scalia was that a state could prohibit only the most patently offensive types of obscenity, even though punishment is allowed for all types of obscenity.[298]

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[291] *Id.* at 414 (1992) (White, J., concurring in the judgment).

[292] *Id.* at 417 (Stevens, J., concurring in the judgment).

[293] *Id.* at 416 (Blackmun, J., concurring in the judgment).

[294] Justice O'Connor joined Justice White's opinion concurring in the judgment. *See id.* at 397 (White, J., concurring in judgment).

[295] *Id.* at 416 (Blackmun, J., concurring in judgment).

[296] *Id.* at 428 (Stevens, J., concurring in judgment).

Other justices complained about that portion of the opinion. If the entire category is proscribable, they argued, the subecategory is automatically proscribable.[299]

The debate raises interesting constitutional questions. On the surface, the argument that if a category of speech is not protected by the First Amendment, a subcategory is likewise not protected and can be proscribed without any further analysis would seem to be correct. On the other hand, if a state decides not to proscribe a category of speech that the Supreme Court has held to be constitutionally proscribable, isn't the state then required to justify proscriptions on the subcategory? Within the boundaries of the state, the broader category may be accessed by residents, but the subcategory may not. Can the state simply respond that the greater proscription allows the lesser, even though the greater is not being applied within the jurisdiction of the state?

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[297] *See* discussion accompanying *supra* notes 86-87.

[298] 505 U.S. at 388.

[299] *See* discussion accompanying *supra* notes 86-87.

The exploration of those questions lies outside the scope of this paper. The broader, more troubling question, however, is why did the Court decide to break from the longstanding tradition of requiring that there be a likelihood of direct and immediate harm before offensive speech can be proscribed under the Constitution. The answer provided by the Court is unsatisfying. Justice O'Conner wrote that cross burning could be singled out because of its particularly virulent nature, that is, because its history establishes that it symbolizes hatred, that it sometimes has been used as a means of intimidation.

That rationale, however, is based upon the content of the message, not on a rational determination that cross burning constitutes a true threat. The threat – regardless of the vehicle used to convey the threat – can be proscribed. By allowing states to single out cross burning as one of many ways individuals can be intimidated, the Court is inviting erosion of another longstanding judicial tradition – that political expression receives the most stringent protection guaranteed by the First Amendment.[300] Because much of the debate over cross burning is political rather than judicial, every time a court is required to determine whether a specific cross burning falls into the category of intimidation or constitutes political expression, there is a possibility that protection for political expression will be eroded. The erosion is much more likely in those instances when the cross burning is not easily categorized.

In *Virginia v. Black,* for example, even though the Court dismissed the conviction on grounds that the cross burning, which took place in an open field during a KKK rally, was political expression, there was testimony at trial by a woman who said she became frightened when she saw the burning cross. She deserves to be protected from the fear, Justice O'Connor wrote in the majority opinion.

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[300] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 273-74 (1963).

Similarly, the Court remanded the convictions of Richard Elliott and Jonathan O'Mara for further action, on grounds that the cross burnings in which they participated were intimidating – they involved burning a cross in the yard of a neighbor. But could not Elliott and O'Mara have moved the cross fifty feet or so, outside the boundaries of the neighbor's yard, and then argued that they did not intend to intimidate the neighbor, they merely intended to express their ideological opposition to integration or to African Americans in general? Indeed, Justice O'Connor made it clear that, regardless of the intent of the cross burner, the message of cross burning is always one of hatred.[301] But that's not enough for the activity to be proscribed, because sometimes, a majority of the justices admitted, cross burning constitutes "core political speech."[302] Only when the activity moves beyond ideology and becomes threatening may it be banned.

This is a conundrum with which state and federal courts have been wrestling since *R.A.V.* created a similar loophole. States that have upheld cross-burning statutes have done so on the basis that cross burnings are threats rather than political debate. In addition, federal courts have affirmed cross-burning convictions both on grounds that cross burnings constitute threats[303] and on grounds that they constitute intimidations[304] which, until the ruling in *Virginia v. Black,* had been a lesser evil. State courts that have refused to affirm convictions for cross burning, however, have generally done so because the activities don't rise to the level of threats. While laws prohibiting threats are constitutional, cross burning laws aimed at speech – or even conduct that is merely intimidating – go too far.[305]

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[301] *Id.* at 1546.

[302] *Id.* at 1550.

[303] *See, e.g.*, United States v. Haywood, 6 F.3d 1241 (7th Cir. 1993).

[304] *See, e.g.*, United States v. Stewart, 65 F.3d 918 (11th Cir. 1995); United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994); United States v. Lee, 6 F.3d 1297 (8th Cir. 1993).

It's not at all clear whether the ruling in *Virginia v. Black* would have changed any of the outcomes of the state or federal cases. Only one federal prosecution for cross burning was overturned, for example, and in that case, the court left open the door for a successful subsequent prosecution.[306] States were not as successful in prosecuting cross burners, but there is little evidence that *Virginia v. Black* would have changed that. In two cases, courts indicated that the laws at issue contained the same deficiencies as the St. Paul ordinance in *R.A.V.*,[307] and in three other cases, the defendants burned crosses in the yards of their targets, meeting what appears to be one of the tests of "intimidation."[308]

Similarly, it is unclear whether *Virginia v. Black* will help lower courts with cross burning cases yet to be heard. On the one hand, it is relatively simple to establish that cross burning is only proscribable when it is intimidating. On the other hand, however, the Court has not established a division that is easily recognizable. Indeed, cross burning might be the perfect example of the dilemma the Court recognized thirty-five years earlier when it established the intermediate scrutiny test to determine when expressive conduct may be regulated.[309] In *United States v. O'Brien,* Chief Justice Earl Warren noted that the court "[C]annot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express ideas."[310] The government has greater power to regulate expressive conduct, Chief Justice Warren wrote, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct."[311] Cross burning is the epitome of conduct that combines speech and nonspeech elements, a point dramatically demonstrated by Justice O'Connor's majority opinion.[312]

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[305] *See, e.g.*, State v. T.B.D., 656 So.2d 497 (Fla. 1995); In re Steven S., 31 Cal. Rptr. 2d 644 (Cal. 1994); State v. Vawter, 642 A.2d 349 (N.J. 1994).

[306] *See* discussion accompanying *supra* notes 117-21.

[307] *See* New Jersey v. Vawter, 642 A.2d 349 (N.J. 1994); State v. Ramsey, 430 S.E.2d 511 (S.C. 1993).

[308] *See* In re Steven S., 31 Cal. Rptr. 2d 644 (Cal. Ct. App. 1994); Florida v. T.B.D., 656 So. 2d 479 (Fla. Ct. App. 1995); Maryland v. Sheldon, 629 A.2d 753 (Md. 1993).

[309] United States v. O'Brien, 391 U.S. 367, 377 (1968). The test provides that a government regulation on expressive conduct is constitutional if (1) the regulation is within the constitutional power of the

It's clear that the Court is not finished with its jurisprudence regarding intimidation in general and cross burning in particular. Just as the Court first established that obscenity is not protected by the First Amendment, then years later established a test to determine when material is obscene; just as the Court first established that some expressive conduct is protected and years later determined a test to determine when that symbolic speech is protected, the Court is eventually going to have to establish a test to determine when speech becomes intimidating.

Until that time, unfortunately, the same benediction that Justice Harry Blackmun pronounced for *R.A.V.* will apply to *Virginia v. Black:* "It will serve as precedent for future cases or it will not. Either result is disheartening."[313]

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government, (2) if it furthers an important or substantial governmental interest, (3) if the governmental interest is unrelated to the suppression of free expression, and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

[310] *Id.* at 376.

[311] *Id.*

[312] *See* 123 S.Ct. 1536, 1544-47 (2003).

[313] 505 U.S. 377, 415 (1992)(Blackmun, J., concurring).

Defamation and Mental Disorder: The Enduring Stigma

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Defamation and Mental Disorder: The Enduring Stigma

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Court opinions provide evidence that an allegation of mental disorder continues to be defamatory, despite modern treatments for the condition. This paper traces the history of cases based on "imputations of mental derangement" and identifies several important trends. Generally, contemporary claims are actionable if they are based on a medicalized allegation that affects the plaintiff's professional status. But courts have been quick to recognize a qualified privilege for employers and physicians to make such allegations.

Defamation and Mental Disorder: The Enduring Stigma

When an article in *The New Republic* claimed that conservative political leader Paul Weyrich had once been overcome by irrational anger such that he "frothed at the mouth,"[1] the politician filed a libel suit, saying the article portrayed him as mentally unsound.[2] The U.S. Court of Appeals for the District of Columbia Circuit agreed with Weyrich, and in 2001 reversed the district court's dismissal of the claim.[3] "There is no doubt that a reasonable person … could very well conclude that appellant is an emotionally unstable individual unfit for his trade or profession," the court stated.[4]

According to a U.S. Surgeon General's report released in 1999, the stigma surrounding mental illness has intensified over the past 40 years.[5] As this paper will show, the Surgeon General's assertion is supported by court decisions regarding allegations of mental illness. The frequency of decisions on this issue actually increased toward the end of the twentieth century. The continuing stigma associated with mental disorder seems paradoxical, given the widespread use of pharmaceutical treatments for mental conditions[6] and the frequent discussion of mental disorder in the popular media.[7] This paper examines why, despite modern treatments for mental

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[1] Weyrich v. New Republic, Inc., 235 F.3d 617, 625 (D.C. Cir. 2001).
[2] *Id.* at 623.
[3] *Id.* at 628.
[4] *Id.*
[5] Pub. Health Serv., U.S. Dep't of Health and Human Serv., *Mental Health: A Report of the Surgeon General"*(1999), *hereinafter Surgeon General's Report*, at 8.
[6] *See, e.g., The American Psychiatric Press Textbook of Psychopharmacology* (Alan F. Schatzberg and Charles B. Nemeroff, eds., 1995), at xix, discussing the recent development of the field of psychopharmacology and the proliferation of information on the topic.
[7] References to mental health abound in popular culture, and the following examples mere scratch the surface of what is available. Books include Peter D. Kramer, *Listening to Prozac* (1997); Margaret Moorman, *My Sister's Keeper: Learning to Cope with a Sibling's Mental Illness* (2002); and Eleanor L. Futscher, *Through the Darkness: Coping with the Legacy of Mental Illness* (2000). Popular music about the antidepressant Prozac alone is substantial, including Bellevue Cadillac, *Prozac* (Hepcat Records, 1998); Various artists, *Throw Out the Prozac: Here Come our Polka Heroes* (Our Heritage, 1998); and Front Line Assembly, "Comatose (Prozac 75 mg)," on *Comatose Metropolis* (1998). In addition, Tony Soprano, a character on the primetime HBO series The Sopranos, sees a

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disorder, and its apparent social acceptance based on its prominence in popular culture, legal claims continue to arise based on an imputation of this condition.

Far from being limited to the personal shame of the stigmatized, the stigma associated with mental disorder ultimately has a profound impact on the productivity of established market economies. A worldwide study revealed that mental illness is second to cardiovascular conditions in the disease burden it places on such economies.[8] In the United States, much of this illness goes untreated. According to the1999 Surgeon General's report, nearly two-thirds of individuals with diagnosable mental disorders do not seek treatment.[9] The stigma associated with receiving treatment for a mental disorder is a key reason that people do not seek such treatment.[10] The Surgeon General's report emphasized that stigma is the "most formidable obstacle to future progress in the arena of mental illness and health."[11]At the individual level, psychiatric research has shown that stigma can pose a barrier to the recovery of people with mental illness in several important ways.[12]

Given the steep cost of mental disorder, and the role that stigma plays in perpetuating these costs, it is important to know the extent to which mental illness continues to be stigmatized. The law of defamation, which protects reputation, provides an apt way to study the degree to which stigma continues to be associated with mental disorder. From a sociological perspective,

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psychiatrist. *See* Joshua Kendall, "Managed Care Tried to Kill Off Freud: Can Tony Soprano Help Revive Him?" *Boston Globe*, February 9, 2003, at D1.

[8] *Id.* at 4, citing Harv. Sch. Pub. Health, "The Global Burden of Disease: A Comprehensive Assessment of Mortality and Disability from Diseases, Injuries and Risk Factors in 1990 and Projected to 2020 (C.J.L. Murray & A.D. Lopez, eds, 1996). Disease burden signifies years of life lost to premature death and years lived with a disability of a particular severity and duration. *Id.*

[9] *Id.* at 8.

[10] *Id.*

[11] *Id.* at 3.

[12] Deborah Perlick, "Special Section on Stigma as a Barrier to Recovery: Introduction," 52 *Psychiatric Services* 1613 (2001).

laws arise in part from the values of a society.[13] An effective legal system legitimizes the rules by which a society lives.[14] Judicial decisions represent an authoritative interpretation of the rules that compose the legal system.[15] Thus court opinions on this topic can provide evidence about the extent to which American society still stigmatizes mental illness, and whether such stigmatization is legitimized by legal institutions.

The purpose of this paper is to review court opinions to determine the extent to which such stigmatization and legitimization take place. It reviews all cases listed in *West's Digest* in the category "libel by imputation of mental derangement" from the inception of the digest's coverage in 1653 to the present. The paper begins with background about three concepts that play a role in the disposition of the cases — stigma, reputation and medicalization. The background section shows that mental disorder has long been associated with stigma. It also discusses the notion of reputation and how differing conceptions of reputation interact with allegations of mental illness. Finally, it reviews the medicalization of mental illness, which has resulted in physicians becoming society's accepted authorities on the topic.

The chronological case review shows that an imputation of mental disorder has been found defamatory from the nineteenth century to the present. However, the concept of reputation underlying the cases has shifted from dignity to property, with increasing numbers of cases arising from workplace situations. Courts did not doubt that a plaintiff's reputation could be damaged in such circumstances. In keeping with the trend of medicalization, courts tended to take seriously allegations of mental disorder that were medicalized and specific, rather than rhetorical and general. Stakes were high in some cases, where a diagnosis of mental illness caused an employer to deem the plaintiff unfit for work. Ironically, courts found that both the employer and the physician in such situations had a privilege to make the comments. Ultimately, plaintiffs had great difficulty clearing their names due to the great leeway that courts gave these defendants. The paper concludes by arguing that courts have been too quick to accept the qualified privilege defense, and urges them to be more careful in this regard, to help prevent perpetuation of the stigma.

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[13] *See generally* Talcott Parsons, "The Law and Social Control," in *The Sociology of Law*, at 60-68 (William M. Evan, ed., 1980). For additional of discussion of the law, society and social norms, *see* H.L.A. Hart, *The Concept of Law* (1961); Anthony T. Kronman, *Max Weber* (1983); and Eric A. Posner, *Law and Social Norms* (2000).
[14] *Id.*

Underlying Concepts: Stigma, Reputation and Medicalization

This section provides an overview of three concepts that play a major role in the development of the law of defamation by imputation of mental derangement: stigma, reputation and medicalization. It begins with a definition of stigma and a review of its long relationship with mental disorder as well as its relationship to defamation law. Next is an overview of the concept of reputation, for reputation is what defamation law is intended to protect. Reputation historically has been construed in several different ways, and the concept of reputation underlying a case has played a role in its disposition. Third is a very brief discussion of the medicalization of mental disorder. The medical profession's growing control over what used to be called madness.

Stigma, mental illness and defamation

Mental disorder has long been associated with stigma. As Erving Goffman noted in his widely cited book on the topic, the word stigma originated with the ancient Greeks. They used it to refer to bodily marks, such as cuts and burns, that were inflicted to mark the person as someone of damaged moral status.[16] A comprehensive history of the stigma associated with

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[15] *Id.*

[16] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963), at 1.

mental disorder is beyond the scope of this paper, but a brief discussion of why mental disorder has been stigmatized can inform our subsequent analysis of the cases.

A scandalous episode in the history of mental disorder was the Inquisition, the Roman Catholic Church tribunal that in the fifteenth century sought out and punished heretics and other "deviants," some of them the mentally disordered and alleged witches.[17] A "reformed" witch-hunter wrote the following of the church's attempts to compel confessions from the accused: "the result is the same whether she [the accused] confesses or not. If she confesses, her guilt is clear: she is executed. If she does not confess, the torture is repeated – twice, thrice, four times. … She can never clear herself."[18] Although much has changed since the Inquisition, we will see that the stigma associated with mental illness remains virtually indelible.

In seventeenth century England, mental disorder was linked to diabolical possession or hereditary taint.[19] Those with mental disorder have, in the past two or three centuries, been "subjected to compulsory and coercive medical treatment, usually under conditions of confinement and forfeiture of civil rights," according to social historian Roy Porter, unlike those suffering from somatic diseases.[20] "By contrast, the seriously mentally ill … have been subjected to a transformation in their legal status which has rendered their state more akin to criminals that that of the sick."[21] The madhouse, which later was dubbed the asylum or the mental hospital, was more like a prison than an infirmary.[22] Only in the past several decades has the trend toward the institutionalization of the mentally disordered been reversed.[23] Today, the stigma of mental disorder appears to stem from the public's association of such disorder with violence.[24] Perceptions of mental disorder that included violent behavior actually increased from the 1950s to the 1990s, according to survey research.[25] Yet, according to the Surgeon General's report, "there is very little risk of violence or harm to a stranger from casual contact with an individual who has a mental disorder."[26]

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[17] Peter Conrad and Joseph W. Schneider, *Deviance and Medicalization: From Badness to Sickness* (St. Louis: Mosby, 1980), at 42

[18] *See e.g.*, Thomas S. Szasz, *The Manufacture of Madness* (1970), at 30..

[19] Roy Porter, "Madness and its Institutions," in *Medicine and Society* 279 (Andrew Wear, ed., 1995).

[20] *Id.* at 277-278.

[21] *Id.* at 278.

[22] *Id.*

[23] *Id.*

Goffman used stigma to refer to "an attribute that is deeply discrediting,"[27] and his definition has gained contemporary acceptance by others studying the concept.[28] In the legal arena, defamation law is an indicator of what society finds discrediting. A defamatory statement is one "tending to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace,"[29] a definition that has been stable for more than a century. [30] *West's Digest* continues to list an imputation of mental derangement as defamatory.[31] However, there is evidence that the nature of the allegations that expose a person to such contempt has varied over time and by community. For example, the law has varied over whether an accusation of homosexuality is defamatory.[32] This paper will trace variation in the law of defamation in the United States with regard to mental disorder.

Historically, stigma has been associated with an attribute that is permanent, such as a brand or a tattoo.[33] The stigma surrounding mental disorder has, over time, stemmed from a variety of perceptions about its sufferers, including their diabolical possession, their hereditary taint, their putative violent behavior, and the shame associated with the criminal-like loss of personal freedom they often experience. In sum, stigma is an indelible trait, and its association with mental disorder stems in part from the perceived dangerousness of its sufferers. This paper will show that the label "mentally ill" can indeed be very difficult to refute.

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[24] Public Health Serv., U.S. Dep't of Health and Human Serv., *supra* note 8, at 7.

[25] *Id.*

[26] *Id.*

[27] Goffman, *supra* note 16, at 3.

[28] Irwin Katz, *Stigma: A Social Psychological Analysis* (1981) at 2; Robert M. Page, *Stigma* (1984) at 5. Bruce G. Link et al., "The Consequences of Stigma for Persons with Mental Illness: Evidence from the Social Sciences" in *Stigma and Mental Illness* 87 (Paul J. Fink and Allan Tasman, eds., 1992).

[29] Elizabeth M. Koehler, "The Variable Nature of Defamation: Social Mores and Accusations of Homosexuality," 76 *Journalism Q.* 217 (1999), citing Kimmerle v. New York Evening Journal, 186 N.E. 217, 218 (N.Y. 1933).

[30] Koehler at 217

[31] *See generally* Paul J. Fink and Allan Tasman, eds., *Stigma and Mental Illness* (1992). Chapters 5-8 trace the history of stigma and mental illness, beginning with ancient Greece.

[32] *Id.*

[33] *See* note 19, *supra,* and accompanying text.

Changing concepts of reputation

Plaintiffs in defamation cases seek to protect reputation. Reputation is rooted in the "social apprehension that we have of each other,"[34] according to legal scholar Robert C. Post, who in 1986 published a frequently cited article on the topic.[35] Defamation law thus makes assumptions about how people are connected in society. As that image of society varies, so does the nature of the reputation that the law of defamation seeks to protect.[36] Post reviewed the three concepts of reputation that he believed had the most influence on the development of the common law of defamation.[37] Each concept corresponds to a separate image of a well-ordered society.[38] They are: reputation as property, reputation as honor and reputation as dignity.[39] All three have had clear influence on the common law of defamation.[40]

The concept of reputation as property corresponds to a "market" image of society and is probably the most easily understood by contemporary observers.[41] In a market society, a reputation is something that can be earned through work or the exercise of talent.[42] "The market provides the mechanism by which the value of property is determined," Post wrote.[43] "The purpose of the law of defamation is to protect individuals within the market by ensuring that their reputation is not wrongfully deprived of its proper market value."[44] From this perspective, reputation is viewed as a private possession.[45]

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[34] Robert C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," 74 *Calif. L. Rev.* 691 (1986), at 692.
[35] *Id.*
[36] *Id.* at 692-693.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 717.
[41] *Id.*
[42] *Id.* at 693-694.

Reputation also can be conceived of as honor, according to Post.[46] The image of society in this view is one of well-established, pervasive social roles, as was the case in England before the industrial revolution.[47] Honor stemmed from social consensus over the status of social roles in what is sometimes called a "deference society."[48] Individuals did not earn honor through work in this scenario; they claimed a right to it through the status with which society endows their social role.[49] Thus a king did not need to work to receive the honor of kingship; rather, he benefited from the honor that society bestows on his position as king.[50] The notion of honor suggests that identity is closely related to one's social or public role.[51] In a deference society, defamation law is used to define and enforce social roles and maintain social order.[52] Thus in early common law, criticism of a "common person" was not considered injurious, whereas criticism of the king was viewed as injuring not only the monarch but also his government and possibly his relationship with his subjects.[53]

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[43] *Id* at 695.
[44] *Id*. at 695.
[45] *Id*. at 702.
[46] *Id*. at 699.
[47] *Id*.
[48] *Id*. at 702.
[49] *Id*.
[50] *Id*.
[51] *Id*. at 702.
[52] *Id*. at 703.
[53] *Id*. at 702.

A third way of construing reputation is as dignity.[54] This concept links the private and public aspects of the self.[55] The image of society corresponding with this view of reputation is the communitarian society.[56] In this perspective, an individual's identity is shaped by his or her relationship to the community.[57] Defamation law protects the dignity that arises from the respect and self-respect that one earns through full membership in society.[58] This social dignity is maintained by the rules of civility.[59] Society also uses the rules of civility to determine who is a member and who is a nonmember.[60] Those who are members of society will be accorded the respect that is social dignity; nonmembers, or deviants, will not.[61] When reputation is construed as dignity, defamation law must offer protection on two fronts.[62] First, it needs to protect the individual's interest in being included within socially acceptable society; second, it needs to protect society's interests in its own rules of civility.[63]

Contemporary society includes elements of market and communitarian societies.[64] This paper will show that libel claims based on an imputation of mental derangement have shifted from an underlying conception of reputation as dignity to an underlying conception of reputation as property. This shift affected the outcome of the cases. As the twentieth century drew to a close, defamation claims based on an imputation of mental derangement increasingly arose from a workplace situation, with reputation construed as property. Some people lost jobs due to an imputation of mental disorder. Yet they had difficulty clearing their names because the defendant employers enjoyed a qualified privilege to comment on the fitness and competence of employees and prospective employees for their positions.[65]

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[54] *Id.* at 708.
[55] *Id.*
[56] *Id.* at 716.
[57] *Id.* at 709.
[58] *Id.* at 711.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 713.
[63] *Id.*
[64] *Id.* at 721.

Medicalization of mental disorder

The medicalization of mental disorder is important because it has affected two significant issues regarding the cases reviewed below. First, medicalization has meant that physicians play a critical role in the determination of who is mentally disordered. Second, medicalization has shaped the language used in contemporary society to discuss what is now termed mental illness.[66] The medical profession has had significant control over mental disorder for the past two centuries.[67] Physicians established their dominance and autonomy over the field,[68] with important ramifications for the cases reviewed here. Research has shown that the class, status and power of stigmatizer affect the impact of stigmatization.[69] People who are labeled mentally ill by physicians can find it difficult to refute the categorization.[70] The case review will show that courts did indeed find physicians' diagnoses credible. In addition, physicians had a qualified privilege to comment on an individual's mental health.[71]

The language used to describe what is now termed mental illness has changed over the years, with the afflicted being termed "mad, maniacal, insane or lunatic."[72] Choice of language necessarily reflects a particular perspective on the topic. This paper uses the contemporary term of mental disorder for the author's own comments. For other discussion, it uses the language found in source materials. Thus it includes the term "mental derangement" from *West's Digest.*

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[65] *See infra* 304-305 notes and accompanying text.

[66] A detailed discussion of the medicalization of mental illness is beyond the scope of this paper. A thorough treatment of the topic may be found in Peter Conrad and Joseph W. Schneider, *Deviance and Medicalization: From Badness to Sickness* (St. Louis: Mosby, 1980).

[67] *See generally* Conrad, *supra* note 66, at 38-72.

[68] *Id.*

[69] Robert Page, *Stigma* (1984) at 10-11.

[70] *Id.*

[71] *See infra* at note 305 and accompanying text.

The Cases

Because this paper is concerned with tracing changes over time in the defamatory nature of an imputation of mental derangement, cases are reviewed chronologically. Cases are grouped by decade (or several decades) to facilitate discussion of important trends. Within each time period, cases are examined along the following dimensions: type of allegation made, and whether it was medicalized or hyperbolic; the concept of defamation underlying the case, property or dignity; the medium in which the comment occurred; the status of the defendant and any related privilege; and how the court assessed whether the plaintiff was mentally disordered.

Newspaper Articles Impute Insanity: Late Nineteenth Century

Seven cases of defamation by an imputation of mental derangement were decided before 1900.[73] They were about evenly divided between medicalized allegations of mental disorder and rhetorical or hyperbolic allegations. Medicalized terms for mental disorder included "insanity,"[74] "mental derangement"[75] or "lunacy."[76] Holdings were mixed; courts sometimes said such claims were clearly defamatory and actionable,[77] and sometimes not, unless there was evidence of special damages[78] or of injury to the plaintiff's professional reputation.[79]

In contrast, courts had a sympathetic ear for the plaintiffs in the cases that involved rhetorical or hyperbolic allegations.[80] For example, the plaintiff in *Candrian v. Miller,*[81] decided

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[72] Porter, *supra* note 19, at 278.

[73] Joannes v. Burt, 88 Mass. 236 (Mass. 1863); Belknap v. Ball, 47 N.W. 674 (Mich. 1890); Lawson v. Morning Journal Assoc., 32 A.D. 71 (N.Y. Sup. Ct. 1898); Moore v. Francis, 23 N.E. 1127 (N.Y. 1890); Wood v. Boyle, 35 A. 853 (Pa. 1896); Seip v. Deshler, 32 A. 1032 (Pa. 1895); Candrian v. Miller, 73 N.W. 1004 (Wis. 1898).

[74] Joannes v. Burt, 88 Mass. 236, 239 (Mass. 1863); Lawson v. Morning Journal Association, 32 A.D. 71, 75 (N.Y. Sup. Ct. 1898); Seip v. Deshler, 32 A. 1032 (Pa. 1895).

[75] Moore v. Francis, 23 N.E. 1127 (N.Y. 1890).

[76] Lawson v. Morning Journal Assoc., 32 A.D. 71, 72 (N.Y. Sup. Ct. 1898);

[77] Seip v. Deshler, 32 A. 1032 (Pa. 1895), at 1033.

[78] Joannes v. Burt, 88 Mass. 236 (Mass. 1863), at 239.

[79] Moore v. Francis, 23 N.E. 1127 (N.Y. 1890), at 1128.

[80] Candrian v. Miller, 73 N.W. 1004 (Wis. 1898); Wood v. Boyle, 35 A. 853 (Pa. 1896); Belknap v. Ball, 47 N.W. 674 (Mich. 1890).

[81] Candrian v. Miller, 73 N.W. 1004 (Wis. 1898).

in 1898, was described in a newspaper article as a "stupid blockhead, a base dunce and dude; [with] the hide of a rhinoceros."[82] Candrian also was described as "narrow of intellect."[83] The court held that parts of the article were libelous per se.[84] Similarly, the plaintiff in a case decided in 1896 objected to being described in a newspaper article as "without brains"[85] but engaged in a business that required a "large mental endowment."[86] The court stated that the allegation was "plainly and grossly libelous in itself."[87] In yet another case, the plaintiff was a candidate for Congress and claimed that an ungrammatical letter published in the local newspaper and attributed to him, amounted to a defamatory charge about his mental faculties. [88] The state Supreme Court agreed with the plaintiff, saying that if "such a letter were written by the plaintiff, it would show him to be ignorant, illiterate and incapable of performing intelligently his duties as a member of Congress."[89]

Reputation was construed as both dignity[90] and property[91] during this time period.[92] *Seip v. Deshler*, decided in 1895, provides a good illustration of reputation as dignity.[93] The defendant, a peer, referred to Seip as "insane."[94] In charging the jury, the court stated:

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[82] *Id.* at 1005.
[83] *Id.* at 1004.
[84] *Id.* at 1005.
[85] Wood v. Boyle, 35 A. 853 (Pa. 1896).
[86] *Id.*
[87] *Id.*
[88] Belknap v. Ball, 47 N.W. 674, 675 (Mich. 1890).
[89] *Id.* at 676.
[90] Joannes v. Burt, 88 Mass. 236, 1863 Mass. LEXIS 251 (Mass. 1863))(a charge of insanity would "deprive plaintiff of … all … personal …and social rights," *id.* at **5); Wood v. Boyle, 35 A. 853 (Pa. 1896)(the publication was a "purely personal attack upon the plaintiff in his private, individual and personal capacity, at 853); Seip v. Deshler, 32 A. 1032 (Pa. 1895)(plaintiff has "suffered in her character and feelings," at 1032); Candrian v. Miller, 73 N.W. 1004 (Wis. 1898)("in this class of actions the plaintiff's character is always in issue," at 1007).
[91] Joannes v. Burt, 88 Mass. 236 1863 Mass. LEXIS 251 (Mass. 1863)(a charge of insanity would "deprive plaintiff of …all income and emoluments from his professional employments," *id.* at **5); Moore v. Francis, 23 N.E. 1127 (N.Y. 1890)(charge of mental derangement injured plaintiff in "his character and employment as a teller," 1129); Wood v. Boyle, 35 A. 853 (Pa. 1896)(allegation of mental derangement would "disqualify him … from … the business world." 853).
[92] A single case can contain evidence of more than one construction of reputation. In some cases, the underlying concept of reputation was unclear. *See* Belknap v. Ball, 47 N.W. 674 (Mich. 1890) and Lawson v. Morning Journal Assoc., 32 A.D. 71 (N.Y. Sup. Ct. 1898).

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> Insanity, or the condition of one being of unsound mind, is taken notice of by our laws. Where that condition of mind exists the unfortunate party thus afflicted is subject to certain regulations. He or she is liable to have the control of his or her property taken out of his or her hands, and he or she is liable to be taken charge of and confined in an asylum or elsewhere, and for those reasons, outside of the *influence that it may have upon the character of the party and the estimation in which she or he is held in the community.*[95]

In other words, an accusation of insanity can curtail one's ability to be a part of socially respectable society. The loss of autonomy and agency discussed by the court meshes with Porter's observation that the mentally ill were treated during this time period more like prisoners than like sick people.

The concept of reputation as property was clearly illustrated in *Moore v. Francis*, an 1890 case filed by a bank teller whose "mental condition was not entirely good," according to rumors published in the local newspaper.[96] The offending article also stated that the bank had "a little trouble in its affairs occasioned by the mental derangement of Teller Moore."[97] The court agreed with the plaintiff that the words were defamatory, noting that:

> [M]ental derangement has usually a much more serious significance than mere physical disease. There can be no doubt that the imputation of insanity against a man employed in a position of trust and confidence such as that of a bank teller ... is calculated to *injure and prejudice him in that employment* ... The directors of a bank would naturally hesitate to employ a person as teller, whose mind had once given away under stress of similar duties....[98]

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[93] 32 A. 1032 (Pa. 1895). *See also* Candrian v. Miller, 73 N.W. 1004 (Wis. 1898); Belknap v. Ball, 47 N.W. 674 (Mich. 1890).
[94] *Id.* at 1032.
[95] *Id.* (Emphasis added.)
[96] 23 N.E. 1127 (N.Y. 1890).
[97] *Id.*
[98] Moore v. Francis, 23 N.E. 1127 (N.Y. 1890) at 1129 (emphasis added).

Most cases from these early years arose from newspaper articles the plaintiff found offensive.[99] Two arose from oral imputations.[100] When it was possible to determine who made the accusation of mental instability, it was one of the plaintiff's peers.[101] Whether a plaintiff was mentally disordered was determined by his or her behavior as well as through expert opinion. For example, the court in *Lawson v. Morning Journal Association* supported the newspaper's contention that it should have been able to present the plaintiff's hospital records and question physician witnesses more thoroughly.[102] "Insanity is established by the acts and conduct of the person, as well as by the opinion of expert witnesses upon such subject," the court stated.[103]

Competing notions of reputation: Early 1900s

Few cases of libel by imputation of mental derangement were decided in the early twentieth century. It was not until 1910 that another case of libel by imputation of mental derangement was decided.[104] Only three such opinions were issued in the subsequent decade,[105] and only four in the following decade.[106] Given the paucity of cases from this time period, the two decades will be discussed together.

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[99] Lawson v. Morning Journal Assoc., 32 A.D. 71, 72 (N.Y. Sup. Ct. 1898); Candrian v. Miller, 73 N.W. 1004 (Wis. 1898); Wood v. Boyle, 35 A. 853 (Pa. 1896); Belknap v. Ball, 47 N.W. 674, 675 (Mich. 1890); Moore v. Francis, 23 N.E. 1127 (N.Y. 1890)

[100] Seip v. Deshler, 32 A. 1032 (Pa. 1895); Joannes v. Burt, 88 Mass. 236 1863 Mass. LEXIS 251 (Mass. 1863).

[101] Candrian v. Miller, 73 N.W. 1004 1898 Wisc. LEXIS 130 (Wis. 1898)(attorney who described himself as "your well-equipped adversary," *id* at ***4); Seip v. Deshler, 32 A. 1032 1895 Pa. LEXIS 1410 (Pa. 1895)("Your learned Friend," *id.* at***4); Joannes v. Burt, 88 Mass. 236 1863 Mass. LEXIS 251 (Mass. 1863)("an avowed enemy of the plaintiff," *id.* at **2). It was not possible to determine who made the allegations that occurred in unsigned newspaper articles. *See, e.g.*, Lawson v. Morning Journal Assoc., 32 A.D. 71 (N.Y. Sup. Ct. 1898), at 73-74.

[102] Lawson v. Morning Journal Assoc., 32 A.D. 71 (N.Y. Sup. Ct. 1898), at 73-74.

[103] *Id.* at 75.

[104] Gressman v. Morning Journal Assoc., 90 N.E. 1131 (N.Y. 1910).

[105] In addition to Gressman, they were Wertz v. Lawrence, 179 P. 813 (Colo. 1919), *aff'd*, 195 P. 647 (Colo. 1921); and McClintock v. McClure, 188 S.W. 867 (Ky. Ct. App. 1916).

[106] Coulter v. Barnes, 205 P. 943 (Colo. 1922); Wertz v. Lawrence, 195 P. 647 (Colo. 1921); Bishop v. New York Times, 135 N.E. 845 (N.Y. 1922); and Taylor v. Daniels, 281 P. 967 (Okla. 1929).

Allegations from 1910 to 1929 were evenly divided between medicalized allegations[107] and rhetorical allegations.[108] The medicalized allegations used the term "insane"[109] or "insanity."[110] Rhetorical allegations were "crazy,"[111] "mind is affected"[112] and "mentally unbalanced."[113] Courts accepted without question that a medicalized allegation was defamatory.[114] They also accepted the rhetorical allegations as defamatory. For example, in *Wertz v. Lawrence*,[115] decided in 1919, the Colorado Supreme Court held that a parent's statement that a teacher "acted like she was crazy"[116] was actionable per se because it "imputed to her a mental condition which wholly unfitted her for the duties of a teacher."[117]

Reputation was construed as both dignity and property in cases from this time period. Reputation as dignity was evident in *Bishop v. New York Times*, decided in 1922.[118] After newspaper articles accused her of being "mentally unbalanced," plaintiff Abigail H. Bishop withdrew from society. Her social secretary said that

> Instead of going into a dining-room as she had done we would sort of sneak into the grill or sneak into some unpretentious little place and have something to eat. In the hotel she would go in the back way so no one would see her. She would take a back seat in the theater where previously she had gone to a box. She would wear a veil so people could not tell her and would not know who she was.[119]

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[107] Coulter v. Barnes, 205 P. 943 (Colo. 1922); McClintock v. McClure, 188 S.W. 867 (Ky. Ct. App. 1916); Gressman v. Morning Journal Assoc., 90 N.E. 1131 (N.Y. 1910).

[108] Wertz v. Lawrence, 179 P. 813 (Colo. 1919), *aff'd*, 195 P. 647 (Colo. 1921).

[109] Gressman v. Morning Journal Assoc., 90 N.E. 1131 (N.Y. 1910).

[110] Coulter v. Barnes, 205 P. 943, 71 Colo. 243, 244 (Colo. 1922).

[111] Wertz v. Lawrence, 179 P. 813, 814 (Colo. 1919), *aff'd*, 195 P. 647 (Colo. 1921).

[112] Taylor v. McDaniels, 281 P. 967, 968 (Okla. 1929).

[113] Bishop v. New York Times, 135 N.E. 845, 846 (N.Y. 1922).

[114] Coulter at 245; Gressman at 1134.

[115] 179 P. 813 (Colo. 1919); *aff'd*, 195 P. 647 (Colo. 1921).

[116] *Id.* at 814.

[117] *Id.* See also McClintock v. McClure, 188 S.W. 867 (Ky. Ct. App. 1916), at 871 (libelous per se); Bishop v. New York Times, 135 N.E. 845 (N.Y. 1922), at 846 (libelous per se); Taylor v. McDaniels, 281 P. 967 (Okla. 1929), at 969 (libelous per se).

[118] Bishop v. New York Times, 135 N.E. 845 (N.Y. 1922).

[119] *Id.* at 848.

Clearly, the plaintiff was concerned about her standing in civil society following publication of the alleged libel. More common, however, during this time period were cases in which reputation was viewed unequivocally as property. Four of the six cases decided during this period dealt squarely with situations in which people's livelihoods were harmed or threatened by the alleged defamation.[120] The injured parties in these cases were a bondsman,[121] a railway official,[122] a nurse[123] and a teacher.[124] The bondsman,[125] the railway official[126] and the nurse[127] lost their jobs as a result of the allegations of mental disorder. Clearly, an allegation of mental disorder could have serious consequences during this time period.

Half the cases from the early 1900s arose from allegations made in a newspaper article.[128] The other half arose from a spoken interchange[129] or from a letter written by a business acquaintance.[130] Business letters as sources of defamatory remarks reflect the increased emphasis on reputation as property that occurred during these years. The qualified privilege defense was successfully used in a workplace situation for the first time, by a businessman who was critical of an associate.[131] In addition to newspaper articles, allegations came from a peer[132] or an employer.[133]

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[120] Wertz v. Lawrence, 179 P. 813 (Colo. 1919); McClintock v. McClure, 188 S.W. 867 (Ky. Ct. App. 1916); Gressman v. Morning Journal Assoc., 90 N.E. 1131 (N.Y. 1910); Taylor v. McDaniels, 281 P. 967 (Okla. 1929). The prevailing notion of reputation was unclear in Coulter v. Barnes, 205 P. 943 (Colo. 1922).

[121] McClintock v. McClure188 S.W. 867 (Ky. Ct. App. 1916).

[122] Taylor v. McDaniels, 281 P. 967 (Okla. 1929).

[123] Gressman v. Morning Journal Assoc., 90 N.E. 1131 (N.Y. 1910).

[124] Wertz v. Lawrence, 179 P. 813 (Colo. 1919), *aff'd*, 195 P. 647 (Colo. 1921).

[125] McClintock v. McClure188 S.W. 867 (Ky. Ct. App. 1916), at 872 ("cancellation of the bonds resulted from the publication of the letter.")

[126] Taylor v. McDaniels, 281 P. 967 (Okla. 1929) ("was discharged by that company," *id.* at 967).

[127] Gressman v. Morning Journal Assoc., 90 N.E. 1131 (N.Y. 1910)("discharged from her position," *id.* at 1131).

[128] Coulter v. Barnes, 205 P. 943 (Colo. 1922); Bishop v. New York Times, 135 N.E. 845 (N.Y. 1922); Gressman v. Morning Journal Assoc., 90 N.E. 1131 (N.Y. 1910).

[129] Wertz v. Lawrence, 179 P. 813 (Colo. 1919), *aff'd*, 195 P. 647 (Colo. 1921).

[130] McClintock v. McClure,188 S.W. 867 (Ky. Ct. App. 1916); Taylor v. McDaniels, 281 P. 967 (Okla. 1929).

[131] McClintock v. McClure,188 S.W. 867 (Ky. Ct. App. 1916), at 871.

[132] Wertz v. Lawrence, 179 P. 813 (Colo. 1919), *aff'd*, 195 P. 647 (Colo. 1921).

[133] McClintock v. McClure, 188 S.W. 867 (Ky. Ct. App. 1916); Taylor v. McDaniels, 281 P. 967 (Okla. 1929).

As in the earlier time period, accusations of mental disorder often were based on the plaintiff's purported behavior.[134] In *Taylor v. McDaniels*, the railway official was described as having a "vicious temper."[135] The teacher in *Wertz* was said to have "very severely punished several of her pupils"[136] and to have threatened the defendant with a "heavy iron poker when he visited the school to protest against the punishments inflicted."[137] The nurse was said to have "acted queerly."[138] In *McClintock v. McClure,* the bondsman's supervisor said he had "done some things in the last year that I do not think looks exactly right [sic]."[139] In addition, the supervisor stated that the plaintiff's mother had "lost her mind,"[140] which also was considered actionable. The court stated that this charge "by necessary inference … imputes to [the bondsman] a hereditary predisposition to insanity," which was libelous per se.[141] In one case, however, a governmental lunacy commission determined that the plaintiff was "insane."[142] This is the first example we have encountered of an authoritative body or individual making the allegation of mental instability. It will not be the last.

The shame of institutionalization: 1930-1959

The years 1930 through 1959 saw few court decisions discussing the defamatory nature of an imputation of mental derangement. Just one defamation case[143] involving such an imputation was decided in the 1930s, and three in the 1940s.[144] The 1950s, however, saw the number of defamation cases filed over these allegations increase to six.[145] Again, because of the scarcity of cases from these three decades, they will be discussed as a group.

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[134] Wertz v. Lawrence, 179 P. 813 (Colo. 1919), *aff'd*, 195 P. 647 (Colo. 1921); McClintock v. McClure, 188 S.W. 867 (Ky. Ct. App. 1916); Gressman v. Morning Journal Assoc., 90 N.E. 1131 (N.Y. 1910); Taylor v. McDaniels, 281 P. 967 (Okla. 1929).

[135] Taylor v. McDaniels, 281 P. 967 (Okla. 1929).

[136] Wertz v. Lawrence, 179 P. 813, 814 (Colo. 1919), *aff'd*, 195 P. 647 (Colo. 1921).

[137] *Id.*

[138] Gressman v. Morning Journal Assoc., 90 N.E. 1131 (N.Y. 1910).

[139] McClintock v. McClure, 188 S.W. 867 (Ky. Ct. App. 1916), at 869.

[140] *Id.*

[141] *Id.* at 870-871. Social historian Porter, *supra* note 18, discussed the hereditary taint associated with mental illness.

[142] Coulter v. Barnes, 205 P. 943, 71 Colo. 243 (1922), at 244.

[143] Cavanagh v. Elliott, 270 Ill. App. 21 (1933).

[144] Mattox v. News Syndicate Co., 176 F.2d 897 (2d. Cir. 1949); Brunstein v. Almansi, 71 N.Y.S.2d 802 (N.Y. Sup. Ct. 1947; Wemple v. Delano, 65 N.Y.S. 2d 322 (N.Y. Sup. Ct. 1946).

Medicalized allegations predominated during this time period.[146] They included "anxiety neurosis,"[147] "mentally ill"[148] and "had once been a patient in a mental institution."[149] Moreover, courts accepted that such allegations were libelous per se,[150] or at least libelous per se when the statement referred to the plaintiff's profession.[151] Allegations from these middle years of the twentieth century also included several mentions of plaintiffs being institutionalized for mental disorder.[152] Statements that gave rise to lawsuits included "he … required institutional treatment for mental illness for the protection of himself and society,"[153] "the … woman had once been a patient in a mental institution"[154] and "Why do you turn loose patients like him."[155] The last statement was interpreted to mean that the patient, who had been released from a state mental

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[145] MacRae v. Afro-Am. Co., 172 F.Supp. 184 (E.D. Pa. 1959); Cowper v. Vannier, 156 N.E.2d 761 (Ill. App. Ct. 1959); Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958),Musacchio v. Maida, 137 N.Y.S.2d 131 (N.Y. Sup. Ct. 1954); Jarman v. Offutt, 80 S.E.2d 248, 1954 N.C. LEXIS 391 (N.C. 1954); Campbell v. Jewish Comm. for Pers. Serv., 271 P.2d 185 (Cal. Dist. Ct. App. 1954).

[146] Mattox v. News Syndicate Co., 176 F.2d 897 (2d. Cir. 1949)("had once been a patient in a mental institution," *id.* at 899); Cowper v. Vannier, 156 N.E.2d 761 (Ill. App. Ct. 1959)("recovering from a mental illness," *id.* at 762); Cavanagh v. Elliott, 270 Ill. App. 21 (1933)("decided complex," *id.* at 24); Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958)("required institutional treatment for mental illness," *id.* at 537); Musacchio v. Maida, 137 N.Y.S.2d 131 (N.Y. Sup. Ct. 1954)("There is something with his head. – He is … receiving treatment," *id.* at 132); Brunstein v. Almansi, 71 N.Y.S.2d 802 (N.Y. Sup. Ct. 1947)("insane," *id.* at 802); Jarman v. Offutt, 80 S.E.2d 248, 1954 N.C. LEXIS 391 (N.C. 1954)("suffering from a mental disease," *id.* at ***1). Allegations in the remaining cases did not fit clearly into the category of either medicalized or rhetorical allegation.

[147] Jarman v. Offutt, 80 S.E.2d 248, 1954 N.C. LEXIS 391 (N.C. 1954), at ***1.

[148] Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958), at 537.

[149] Mattox v. News Syndicate Co., 176 F.2d 897 (2d. Cir. 1949), at 899.

[150] Mattox v. News Syndicate Co., 176 F.2d 897 (2d. Cir. 1949), at 901; Cowper v. Vannier, 156 N.E.2d 761 (Ill. App. Ct. 1959), at 762; Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958), at 541; Brunstein v. Almansi, 71 N.Y.S.2d 802 (N.Y. Sup. Ct. 1947), at 802; and Jarman v. Offutt, 80 S.E.2d 248, 1954 N.C. LEXIS 391 (N.C. 1954), at 251.

[151] Cavanagh v. Elliott, 270 Ill. App. 21 (1933), at 27-28; Musacchio v. Maida, 137 N.Y.S.2d 131 (N.Y. Sup. Ct. 1954), at 132-133.

[152] Mattox v. News Syndicate Co., 176 F.2d 897 (2d. Cir. 1949), at 899; Campbell v. Jewish Comm. for Pers. Serv., 271 P.2d 185 (Cal. Dist. Ct. App. 1954), at 187; Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958), at 536; Jarman v. Offutt, 80 S.E.2d 248, 1954 N.C. LEXIS 391 (N.C. 1954), at ***1.

[153] Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958), at 537.

[154] Mattox v. News Syndicate Co., 176 F.2d 897 (2d. Cir. 1949), at 899.

[155] Campbell v. Jewish Comm. for Pers. Serv., 271 P.2d 185 (Cal. Dist. Ct. App. 1954), at 187.

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hospital, did not merit such release and should have been confined indefinitely.[156] Institutionalization of the mentally ill reached its peak during this time period,[157] and the stigma associated with it was evident in these cases.

Reputation was construed as dignity in the majority of cases from this time period.[158] Plaintiffs were concerned about situations that ostracized them from society. *Mattox v. News Syndicate, Inc.*, provides a clear example. The plaintiff was a woman who "had once been a patient in a mental institution,"[159] according to the newspaper article at issue. She testified that, following publication of the article, "when she walked in the street, she heard comments of acquaintances, and whispers, inquiring whether she 'was the girl' who had 'been away.'"[160] As a result, she "ceased going to church or any 'formal gathering'; and … she felt 'self-conscious and embarrassed.'"[161]

Reputation was construed as property in just two cases from this time period.[162] Both were filed by men whose professional reputations were at stake. In *Musacchio v. Maida*, a New York court said it was libelous per se to say of a physician, "There is something with his head. He is in Minnesota receiving treatment."[163] The words, the court said, could be interpreted to mean the plaintiff was mentally unbalanced and unfit for his profession.[164] In *Cavanagh v. Elliott*, the court said it was actionable per se to say that a manager had "a decided complex."[165]

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[156] *Id.*
[157] Conrad, *supra* note 65, at 63.
[158] Mattox v. News Syndicate Co., 176 F.2d 897 (2d. Cir. 1949), at 899-900; MacRae v. Afro-Am. Co., 172 F.Supp. 184 (E.D. Pa. 1959), at 187 ("a communication which suggests that a mother had some responsibility for her daughter's death would … lower her estimation in the community and … blacken her reputation"); Campbell v. Jewish Comm. for Pers. Serv., 271 P.2d 185 (Cal. Dist. Ct. App. 1954), at 187 ("did not merit his freedom and should be confined indefinitely"); Cowper v. Vannier, 156 N.E.2d 761 (Ill. App. Ct. 1959), at 763 ("persons reputed to be of unsound mind are denied the confidence and respect which all right thinking men normally accord their fellow members of society"); Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958), at 537 ("required institutional treatment for mental illness for the protection of himself and society"); and Jarman v. Offutt, 80 S.E.2d 248, 1954 N.C. LEXIS 391 (N.C. 1954), at ***5 ("admitted to a hospital for mental treatment").
[159] 176 F.2d 897 at 899.
[160] *Id.* at 900.
[161] *Id.*
[162] Musacchio v. Maida, 137 N.Y.S.2d 131 (N.Y. Sup. Ct. 1954) and Cavanagh v. Elliott, 270 Ill. App. 21 (1933). The prevailing concept of reputation could not be discerned in two very brief opinions from this time period: Brunstein v. Almansi, 71 N.Y.S.2d 802 (N.Y. Sup. Ct. 1947) and 65 N.Y.S.2d 322 (N.Y. Sup. Ct. 1946).
[163] Musacchio v. Maida, 137 N.Y.S.2d 131 (N.Y. Sup. Ct. 1954), at 132-133.

Half the cases from this time period arose from words printed in newspapers — articles[166] and a political advertisement.[167] The other half arose from interpersonal communications including letters,[168] a postcard, [169] a legal document[170] and the spoken word.[171] In only one case was the allegation made by someone clearly in a position of power over the plaintiff. That case was *Jarman v. Offutt*, and the statements in dispute appeared on an affidavit to admit the plaintiff to a hospital for the mentally disordered.[172] The affidavit was sworn at a judicial session called a lunacy proceeding.[173] Most other allegations were made by peers, such as those appearing in the newspaper articles that reported on municipal meetings.[174] Although *Cavanagh* involved a work-related dispute, the defendant was not the plaintiff's employer.[175]

Privilege was used as a defense in half the cases from this time period.[176] Courts acknowledged privilege with regard to communications with medical and hospital personnel. The court in *Jarman* said the physician's affidavit at the lunacy proceeding was absolutely privileged.[177] Similarly, the court in *Campbell v. Jewish Committee for Personal Service* said that a disputed letter to the superintendent of a state mental hospital was privileged because it was written by a charity that helped mental patients in such hospitals.[178] In contrast, courts rejected newspapers' privilege defenses. The defendant newspapers in *Wemple v. Delano*[179] and *MacRae v. Afro-American Co.*[180] unsuccessfully used what amounted to a defense of fair comment.[181]

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[164] *Id.*

[165] Cavanagh v. Elliott, 270 Ill. App. 21 (1933), at 24-25.

[166] Mattox v. News Syndicate Co., 176 F.2d 897 (2d. Cir. 1949); MacRae v. Afro-Am. Co., 172 F.Supp. 184 (E.D. Pa. 1959); Cowper v. Vannier, 156 N.E.2d 761 (Ill App. Ct. 1959); Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958); Wemple v. Delano, 65 N.Y.S. 2d 322 (N.Y. Sup. Ct. 1946).

[167] Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958).

[168] Campbell v. Jewish Comm. for Pers. Serv., 271 P.2d 185 (Cal. Dist. Ct. App. 1954); Brunstein v. Almansi, 71 N.Y. Sup. C. 194).

[169] Cavanagh v. Elliott, 270 Ill. App. 21 (1933).

[170] Jarman v. Offutt, 80 S.E.2d 248 (N.C. 1954).

[171] Musacchio v. Maida, 137 N.Y.S.2d 131 (N.Y. Sup. Ct. 1954).

[172] Jarman v. Offutt, 80 S.E.2d 248, 1954 N.C. LEXIC 391 (N.C. 1954), at ***1.

[173] *Id.* at 252.

[174] *See* Wemple v. Delano, 65 N.Y.S. 2d 322 (N.Y. Sup. Ct. 1946) and Cowper v. Vannier, 156 N.E.2d 761 (Ill App. Ct. 1959).

[175] 270 Ill. App. 21 (1933).

[176] MacRae v. Afro-Am. Co., 172 F.Supp. 184 (E.D. Pa. 1959); Campbell v. Jewish Comm. for Pers. Serv., 271 P.2d 185 (Cal. Dist. Ct. App. 1954); Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958); Wemple v. Delano, 65 N.Y.S. 2d 322 (N.Y. Sup. Ct. 1946); Jarman v. Offutt, 80 S.E.2d 248 (N.C. 1954).

Accusations of mental disorder made during this time period were based on the plaintiff's behavior[182] or the claim that the plaintiff was institutionalized for treatment of such illness.[183] Behavior that was viewed as possibly indicative of mental illness included suicide,[184] frightening women by following them home[185] and attacking a man with a butcher knife.[186]

Medicalization triumphant: 1960s

Courts in the 1960s distinguished between actionable allegations of mental derangement based on medicalized terminology[187] and nonactionable allegations based on rhetorical hyperbole,[188] a clear departure from the approach of the late nineteenth century. Clinical terms such as "persecution complex"[189] "chronic schizophrenic reaction,"[190] "paranoia"[191] and "obsession"[192] were actionable terms. In contrast, nonactionable hyperbole included "nut,"[193] "mishuginer"[194] and "screwball,"[195] which courts dismissed as mere epithets and name-calling.[196] Similarly, another court stated that "idiot"[197] had been used in a context where it represented a charge of carelessness.[198] Context also was important in a case filed by a stockbroker who objected to the utterance, "you silly stupid senile bum; you are a troublemaker and should be confined to an asylum."[199] Because the comment in no way referred to the plaintiff's position as a stockbroker, it was not considered slanderous per se. This stands in contrast to the decisions of the previous decade that took allegations of institutionalization very seriously.[200]

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[177] 80 S.E.2d 248 (N.C. 1954), at 253.

[178] Campbell v. Jewish Comm. for Pers. Serv., 271 P.2d 185 (Cal. Dist. Ct. App. 1954), at187-188.

[179] Wemple v. Delano, 65 N.Y.S. 2d 322 (N.Y. Sup. Ct. 1946), at 323.

[180] MacRae v. Afro-Am. Co., 172 F.Supp. 184 (E.D. Pa. 1959), at 188.

[181] The court in Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958), did not reach the issue of privilege.

[182] MacRae v. Afro-Am. Co., 172 F.Supp. 184 (E.D. Pa. 1959); Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958); Jarman v. Offutt, 80 S.E.2d 248 (N.C. 1954).

[183] Mattox v. News Syndicate Co., 176 F.2d 897 (2d. Cir. 1949); Campbell v. Jewish Comm. for Pers. Serv., 271 P.2d 185 (Cal. Dist. Ct. App. 1954); Musacchio v. Maida, 137 N.Y.S.2d 131 (N.Y. Sup. Ct. 1954).

[184] MacRae v. Afro-Am. Co., 172 F.Supp. 184 (E.D. Pa. 1959).

[185] Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958).

[186] Jarman v. Offutt, 80 S.E.2d 248 (N.C. 1954).

[187] Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969)("paranoia," *id.* at 329; Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966)("obsession," *id.* at 144); Le Burkien v. Notti, 365 F.2d 143 (7th Cir. 1966)(mentally disturbed," *id.* at 351).

[188] Correia v. Santos, 191 Cal. App.2d 844 (Cal. Ct. App. 1961)(broadcaster's use of the term "insanity" was not to describe the plaintiff as a person who was mentally ill but as one who was unreasonable in his actions and demands," *id.* at 853); Skolnick v. Nudelman, 273 N.E.2d 804 (Ill. App. Ct. 1968)("nut," "mishuginer," *id.* at 810); Cowan v. Time, Inc., 245 N.Y.S.2d 723 (N.Y. Sup. Ct. 1963)("Idiots Afloat," *id.* at 725); Gunsberg v. Roseland Corp., 225 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1962)("you should be confined to an asylum," *id.* at 1021).

The concept of reputation as property dominated the seven cases decided during the 1960s;[201] indeed, two plaintiffs lost their jobs as a result of the alleged defamation,[202] and one lost an election.[203] So strong was this notion of reputation as property that one court took pains to point out that a "finding of mental incompetence casts no aspersion on [the plaintiff's] moral character or loyalty,"[204] that is, her dignity. Courts rejected some claims because the alleged defamation did not refer to the plaintiff in his professional capacity.[205] An example of reputation viewed as property was *Chafin v. Pratt,* filed by a secretary who was placed on involuntary retirement for disability from her federal job.[206] Her employer insisted she undergo a psychiatric examination; the employer deemed "mentally disturbed and unfit for her job."[207]

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[189] Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966), at 355.
[190] *Id.*
[191] Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969) at. 331
[192] Le Burkien v. Notti, 365 F.2d 143 (7th Cir. 1966) at 144.
[193] Skolnick v Nudelman, 237 N.E.2d 804 at 810.
[194] *Id.* Mishuginer, also spelled meshuggener, is a Yiddish term for a foolish or crazy person.
[195] *Id.*
[196] *Id.* at 810.
[197] Cowan v. Time, Inc., 245 N.Y.S.2d 723 (N.Y. Sup. Ct. 1963) at 725.
[198] *Id.* at 726.
[199] Gunsberg v. Roseland Corp., 225 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1962) at 1021.
[200] *See, e.g.*, Mattox v. News Syndicate Co., 176 F.2d 897 (2d Cir. 1949).
[201] Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969); Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966); Le Burkien v. Notti, 365 F.2d 143 (7th Cir. 1966); Correia v. Santos, 191 Cal. App. 2d 844 (Cal. Ct. App. 1961); Skolnick v. Nudelman, 273 N.E.2d 804 (Ill. App. Ct. 1968); Cowan v. Time, 245 N.Y.S.2d 723 (N.Y. Sup. Ct. 1963); Gunsberg v. Roseland Corp, 225 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1962). Only in Cowan is the construction of reputation unclear.
[202] Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966)(involuntary retirement) and Le Burkien v. Notti, 365 F.2d 143 (7th Cir. 1966)(termination).
[203] Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969). Barry Goldwater, the Republican nominee for president in 1964, lost to Lyndon B. Johnson.

Employers, who were the defendants in two cases from this time period,[208] were able to use the defense of executive immunity or privilege. The defendant employer prevailed in *Chafin* based on the immunity of government officials from tort liability for acts committed in the performance of official duties.[209] The court noted that the government has "the paramount interest of any employer in securing efficient employees."[210] Citing a U.S. Supreme Court decision, the court stated that "government employment, in the absence of legislation, can be revoked at the will of the appointing officer."[211] The other case involving executive immunity was *Le Burkien v. Notti,*[212] filed by a woman who was fired from her job after receiving an employment evaluation that said she "had an obsession that people did not like her."[213] The plaintiff claimed that the allegation had made it difficult for her to find another job. She also claimed that, because the evaluation was not written by a psychiatrist, she was entitled to a trial and a factual determination.[214] A federal appeals court disagreed, stating that the employer's statements were privileged.[215] Here we have an example of the difficulty that twentieth century plaintiffs have sometimes had in clearing their names following an allegation of mental disorder.

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[204] Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966).
[205] Correia v. Santos, 191 Cal. App. 2d 844 (Cal. Ct. App. 1961) at 853; Gunsberg v. Roseland Corp., 225 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1962) at 1023.
[206] 358 F.2d 349 (5th Cir. 1966).
[207] *Id.* at 350.
[208] Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966); Le Burkien v. Notti, 365 F.2d 143 (7th Cir. 1966).
[209] Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966), at 352.
[210] *Id.* at 357.
[211] *Id.* at 357, quoting Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, at 896.
[212] 365 F.2d 143 (7th Cir. 1966).
[213] *Id.* at 144.
[214] *Id.* at 144-145.

In addition to employers, others making allegations of mental disorder during this time period were business competitors[216] and magazines.[217] During this time period, psychiatrists were viewed as authorities on whether a person was mentally disordered. As mentioned earlier, the employer in *Chafin* insisted that the plaintiff worker undergo a psychiatric examination.[218] *Goldwater v. Ginzburg*[219] also provided a good example of physicians' opinions about mental illness being viewed as authoritative. The complaint stemmed from a pair of magazine articles that explored the fitness for office of Barry M. Goldwater, the Republican senator from Arizona and candidate for president in the 1964 election.[220] The first article claimed that Goldwater suffered from "paranoia, a serious mental disease."[221] The second article, titled, "What Psychiatrists Say About Goldwater," reported the results of a non-scientific magazine survey in which more than half the respondents purportedly deemed the candidate psychologically unfit for office.[222] Goldwater responded at trial to this attack by introducing into evidence "numerous official Air Force documents and personal health records, and the testimony of his personal physician … for the purpose of establishing that he was not suffering from the mental disease attributed to him."[223] Further emphasizing the importance of medical opinions in this arena, a federal appeals court judge criticized the authors of the articles, noting that they "were not psychiatric experts nor did they have any expert review [the article] or evaluate its conclusions."[224] The court ultimately let stand a jury verdict in favor of Goldwater, rejecting the defendant magazine's claim that the article was protected under the First Amendment.[225] A jury might infer actual malice from the sloppy reporting and writing job performed by Ginzburg, the court stated.[226]

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[215] *Id.* at 145

[216] Correia v. Santos, 191 Cal. App. 2d 844 (Cal. Ct. App. 1961)(broadcaster); Skolnick v. Nudelman, 273 N.E.2d 804 (Ill. App. Ct. 1968)(lawyer).

[217] Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969); Gunsberg v. Roseland Corp., 225 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1962).

[218] Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966), at 351.

[219] Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

[220] *Id.* at 328.

[221] *Id.* at 331.

[222] *Id.* at 334.

[223] *Id.* at 339.

Mental illness in the workplace: 1970s

Medicalized allegations dominated during this time period, occurring in the vast majority of the cases.[227] Some cases made reference to a psychiatrist,[228] while others mentioned an institution for the mentally ill.[229] Several simply involved clinical terms such as "demented,"[230] "insane"[231] and "paranoid … schizophrenic."[232] Courts found most of the medicalized allegations actionable, even when they were made by someone who was not a psychiatrist or mental health expert. When a medicalized allegation was found not actionable, context was important. In *Fram v. Yellow Cab Co.*, a federal district court held that the utterance, "the sort of paranoid thinking that you get from a schizophrenic,"[233] was not actionable because television viewers would not understand the words in their literal sense.[234] The words were properly categorized as "rhetorical hyperbole"[235] or "vigorous epithets,"[236] the court stated. In *Modla v. Parker*, an Arizona appeals court held that the statement, "do me a favor and see a psychiatrist,"[237] was not libelous per se.[238] Because the statement did not pertain to the plaintiff's business reputation, and the plaintiff failed to show special damages, it was not actionable.[239] Allegations stemming from rhetorical hyperbole, such as "nuts,"[240] "berserk"[241] and "crazy"[242] were in the minority during the 1970s. Courts held that such remarks were not libelous per se, but rather "unflattering words."[243]

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[224] *Id.*

[225] *Id.* at 335.

[226] *Id.* at 336-337.

[227] Mills v. Kingsport Times-News, 475 F.Supp. 1005 (W.D. Va. 1979)("psychiatric evalution," *id.* at 1006); Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978)("psychiatric disorder," *id.* at 1173); Hoover v. Peerless Publ'n., 461 F.Supp. 1206 (E.D. Pa. 1978)("mental problems," *id.* at 1208); Fram v. Yellow Cab Co., 380 F.Supp. 1314 (W.D. Pa. 1974)("paranoid … schizophrenic," *id.* at 1323); Modla v. Parker, 495 P.2d 494 (Ariz. Ct. App. 1972)("see a psychiatrist," *id.* at 495); Fort v. Holt, 508 P.2d 792 (Colo. Ct. App. 1973)("released from an insane asylum," *id.* at 793); Russell v. Am. Guild of Variety Artists, 497 P.2d 40 (Haw. 1972)("in the State Mental Hospital," *id* at 42); Demers v. Meuret, 512 P.2d 1348 (Or. 1973)("demented," *id.* at 1348); Capps v. Watts, 247 S.E.2d 606 (S.C. 1978)("paranoid sonofabitch," . at 609); Dickson v. Dickson, 529 P.2d 476 (Wash. Ct. App. 1974)("insane," *id.* at 478).

[228] Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978); Modla v. Parker, 495 P.2d 494 (Ariz. Ct. App. 1972).

[229] Fort v. Holt, 508 P.2d 792 (Colo. Ct. App. 1973)("insane asylum," *id.* at 793); Russell v. Am. Guild of Variety Artists, 497 P.2d 40 (Haw. 1972)("State Mental Hospital," *id* at 42). Capps v. Watts, 247 S.E.2d 606 (S.C. 1978).

[230] Demers v. Meuret, 512 P.2d 1348 (Or. 1973).

[231] Dickson v. Dickson, 529 P.2d 476, 478 (Wash. Ct. App. 1974).

[232] Fram v. Yellow Cab Co., 380 F.Supp. 1314, 1323 (W.D. Pa. 1974).

[233] Fram v. Yellow Cab Co., 380 F.Supp. 1314, 1329 (W.D. Pa. 1974).

Reputation was construed as property in the vast majority of cases from the 1970s.[244] Nearly all of these arose from an employment situation involving the plaintiff;[245] examples include a Navy engineer[246] and a newspaper executive.[247] Indeed, two of the plaintiffs had lost their jobs and attributed the loss to the alleged defamation.[248] In most of the reputation-as-property claims, the courts agreed that the words were actionable.[249] When the words were not actionable, it was because the court deemed them rhetorical hyperbole ("nuts" is an example)[250] or because the remark simply was not defamatory. The latter occurred in a complaint in which the plaintiff said he was libeled by the remark that his "brother was released from an insane asylum."[251] This is the one case in the entire study providing evidence that the hereditary taint of mental disorder that prevailed in earlier times had diminished. A clear example of reputation as dignity occurred in only one of the cases from the 1970s, *Dickson v. Dickson,* which was filed by a woman against her ex-husband for repeatedly accusing her of being insane. "His statements about her mental health … are injurious to her reputation and subject her to scorn and ridicule," the court stated.[252] The concept of reputation in the remaining cases was too unclear for classification.[253]

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[234] *Id.* at 1330.
[235] *Id.*
[236] *Id.*
[237] Modla v. Parker, 495 P.2d 494, 495 (Ariz. Ct. App. 1972).
[238] *Id.* at 497.
[239] *Id.*
[240] McGowen v. Prentice, 341 So.2d 55 (La. Ct. App. 1976), at 56.
[241] Brill v. Brenner, 308 N.Y.S.2d 218 (N.Y. Civ. Ct. 1970), at 222.
[242] Wetzel v. Gulf Oil Corp., 455 F.2d 857 (9th Cir. 1972), at 859.
[243] McGowen v. Prentice, 341 So.2d 55 (La. Ct. App. 1976), at 58.
[244] Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978)(Navy engineer); Hoover v. Peerless Publ'n., 461 F.Supp. 1206 (E.D. Pa. 1978)(newspaper executive); Fram v. Yellow Cab Co., 380 F.Supp. 1314 (W.D. Pa. 1974)(cab company president); Fort v. Holt, 508 P.2d 792 (Colo. Ct. App. 1973)(damaged credit rating); Russell v. Am. Guild of Variety Artists, 497 P.2d 40 (Haw. 1972)(nightclub performer); McGowen v. Prentice, 341 So.2d 55 (La. Ct. App. 1976)(teacher); Demers v. Meuret, 512 P.2d 1348 (Or. 1973)(president of airport operation company); Capps v. Watts, 247 S.E.2d 606 (S.C. 1978)(executive of charitable organization).
[245] Of the cases listed in note 246, *supra*, only Fort v. Holt, 508 P.2d 792 (Colo. Ct. App. 1973), did not involve an employment situation.
[246] Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978).
[247] Hoover v. Peerless Publ'n., 461 F.Supp. 1206 (E.D. Pa. 1978).
[248] Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978); Russell v. Am. Guild of Variety Artists, 497 P.2d 40 (Haw. 1972).
[249] Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978); Hoover v. Peerless Publ'n., 461 F.Supp. 1206 (E.D. Pa. 1978); Demers v. Meuret, 512 P.2d 1348 (Or. 1973); Russell v. Am. Guild of Variety Artists, 497 P.2d 40 (Haw. 1972); Capps v. Watts, 247 S.E.2d 606 (S.C. 1978).

By the 1970s, the majority of cases stemmed from interpersonal communications[254] rather than from reports in the mass media,[255] continuing the trend from the preceding decade. Half of the cases from this decade involved a defendant who had power over the plaintiff. These consisted of employers[256] and, in one case, an attending physician (not a psychiatrist) at a hospital.[257] Most employers claimed privilege as a defense.[258] In *Russell v. American Guild of Variety Artists*, a nightclub performer's former employer claimed a qualified privilege to comment on the performer's hospitalization.[259] The court agreed, and furthermore held that the privilege was not abused.[260]

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[250] The word "nuts" was at issue in McGowen v. Prentice, 341 So.2d 55 (La. Ct. App. 1976), at 56. The remarks about "paranoid … schizophrenic" in Fram v. Yellow Cab Co., 380 F.Supp. 1314 (W.D. Pa. 1974), at 1323, also were nonactionable hyperbole.

[251] Fort v. Holt, 508 P.2d 792 (Colo. Ct. App. 1973), at 793.

[252] Dickson v. Dickson, 529 P.2d 476, 478 (Wash. Ct. App. 1974).

[253] Mills v. Kingport Times-News, 475 F.Supp. 1005 (W.D. Va. 1979); Wetzel v. Gulf Oil Corp., 455 F.2d 857 (9th Cir. 1972); Modla v. Parker, 495 P.2d 494 (Ariz. Ct. App. 1972); Brill v. Brenner, 308 N.Y.S.2d 218 (N.Y. Civ. Ct. 1970).

[254] Wetzel v. Gulf Oil Corp., 455 F.2d 857 (9th Cir. 1972)(telephone conversation with gas station manager); Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978)(Navy physician's report on employee); Hoover v. Peerless Publ'ns, Inc., 461 F.Supp. 1206 (E.D. Pa. 1978)(letter of employment reference); Modla v. Parker, 495 P.2d 494 (Ariz. Ct. App. 1972)(hospital physician's comment to patient); Fort v. Holt, 508 P.2d 792 (Colo. Ct. App. 1973)(personal letter); Russell v. Am. Guild of Variety Artists, 497 P.2d 40 (Haw. 1972)(letter of employment reference); McGowen v. Prentice, 341 So.2d 55 (La. Ct. App. 1976)(supervisor's statements about employee); Brill v. Brenner, 308 N.Y.S.2d 218 (N.Y. Civ. Ct. 1970)(employer's utterances to employee); Demers v. Meuret, 512 P.2d 1348 (Or. 1973)(public meeting); Dickson v. Dickson, 529 P.2d 476, 478 (Wash. Ct. App. 1974)(statements by ex-husband about former wife).

[255] Mills v. Kingport Times-News, 475 F.Supp. 1005 (W.D. Va. 1979)(newspaper); Fram v. Yellow Cab Co., 380 F.Supp. 1314 (W.D. Pa. 1974)(television show); Capps v. Watts, 247 S.E.2d 606 (S.C. 1978)(newspaper).

Similarly, in the case filed by the Navy engineer who was terminated, the court held that neither the United States nor the psychiatrist who deemed the engineer mentally disturbed was liable.[261] The United States was not liable because it is immune for claims arising out of defamation by governmental employees.[262] The law of defamation recognizes a qualified privilege for warnings by a physician to the employer of a patient,[263] the court noted. Emphasizing the need for "frank disclosure by doctors,"[264] it stated: "Employers obviously have a legitimate need and even a duty to determine whether or not their employees are professionally, physically and psychologically capable of performing their duties."[265]

In another group of cases from the 1970s, defendants claimed their comments were qualifiedly privileged because they were speech about matters of public concern.[266] This occurred in the two cases that arose from news reports as well as a case that resulted from comments made at a public meeting. The court agreed with the defendant in *Fram*, the case filed by the cab company president. Fram was a public figure and had failed to show that his business adversary's comments on a television news program were made with actual malice.[267] In another case, a newspaper erroneously reported that a woman charged with the murder of her husband had been committed to a state hospital for psychiatric evaluation. The newspaper claimed it had an absolute privilege to report on material found in public records; in this case, a prosecutor's documents. But the court left it for a jury to decide whether the newspaper had deviated enough from the content of those records to lose its privilege. Similarly, in a case filed by an airport executive who objected to being called a "demented old man … [who] might come out and chop our airplanes up with an axe" at an airport commission meeting, the court said there is a qualified rather than absolute privilege because it was not a judicial proceeding.[268] The court did not rule on whether the words were in fact qualifiedly privileged.[269]

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[256] Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978); Hoover v. Peerless Publ'ns, Inc., 461 F.Supp. 1206 (E.D. Pa. 1978); Russell v. Am. Guild of Variety Artists, 497 P.2d 40 (Haw. 1972); McGowen v. Prentice, 341 So.2d 55 (La. Ct. App. 1976).
[257] Modla v. Parker, 495 P.2d 494 (Ariz. Ct. App. 1972).
[258] Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978); Hoover v. Peerless Publ'ns, Inc., 461 F.Supp. 1206 (E.D. Pa. 1978); Russell v. Am. Guild of Variety Artists, 497 P.2d 40 (Haw. 1972).
[259] Russell v. Am. Guild of Variety Artists, 497 P.2d 40 (Haw. 1972).
[260] *Id.* at 46.
[261] Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978).
[262] *Id.* at 1178.
[263] *Id.* at 1179.
[264] *Id.* at 1176.
[265] *Id.*

Accusations of mental disorder during this time period resulted from the alleged behavior[270] or circumstances of the plaintiff[271] as well as from the opinions of authorities.[272] Circumstances that gave rise to suits were an accusation that a plaintiff's mother "attempted to commit suicide"[273] and was "berserk,"[274] and an accusation that a plaintiff's brother had been "at one time committed to an insane asylum.[275] Authoritative opinions were the diagnosis of a

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[266] Demers v. Meuret, 512 P.2d 1348 (Or. 1973); Mills v. Kingport Times-News, 475 F.Supp. 1005 (W.D. Va. 1979); Fram v. Yellow Cab Co., 380 F.Supp. 1314 (W.D. Pa. 1974).

[267] Fram v. Yellow Cab Co., 380 F.Supp. 1314 (W.D. Pa. 1974); Fram v. Yellow Cab Co., 380 F.Supp. 1314 (W.D. Pa. 1974).

[268] Demers v. Meuret, 512 P.2d 1348 (Or. 1973) at 1348.

[269] *Id.* at 1350.

[270] Demers v. Meuret, 512 P.2d 1348 (Or. 1973).

[271] Fort v. Holt, 508 P.2d 792 (Colo. Ct. App. 1973); Brill v. Brenner, 308 N.Y.S.2d 218 (N.Y. Civ. Ct. 1970).

[272] Mills v. Kingport Times-News, 475 F.Supp. 1005 (W.D. Va. 1979); Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978); Mills v. Kingport Times-News, 475 F.Supp. 1005 (W.D. Va. 1979).

[273] Brill v. Brenner, 308 N.Y.S.2d 218 (N.Y. Civ. Ct. 1970), at 222.

[274] *Id.*

[275] Fort v. Holt, 508 P.2d 792 (Colo. Ct. App. 1973), at 794.

physician[276] and commitment to a mental institution,[277] which by definition required an official finding of mental illness.

Cases from the 1970s indicate that plaintiffs had difficulty recovering when two types of speakers were involved. The diagnosis of physicians was privileged, and therefore difficult to refute; business associates had a qualified privilege to discuss a person's mental health in relation to a job. This occurred at the same time that the workplace became the most fertile ground for the origins of these defamation cases. It presented a Catch-22 for plaintiffs.

Peak decade for litigation: 1980s

Published opinions on defamation claims based on an imputation of mental disorder peaked in the 1980s, when thirteen such decisions were issued.[278] Although many opinions were issued during these years, plaintiffs did not prevail in any of them — not even medicalized, workplace-related allegations. Courts gave leeway to employers and others who made such accusations, and declined to deem actionable any allegations that could be written off as opinion or rhetorical hyperbole.

Most allegations of mental disorder in the 1980s were medicalized,[279] often referring to a psychiatric diagnosis, such as "paranoid schizophrenia,"[280] or reference to psychiatric treatment, such as "treated by a psychiatrist for past emotional problems."[281] Courts sometimes found such statements actionable,[282] and sometimes did not.[283] A few hyperbolic allegations also occurred during this time period,[284] such as "crazy,"[285] "raving maniac"[286] and "vengeful hysteria."[287] Courts rejected all of them, deeming them name-calling[288] or opinion.[289]

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[276] Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978).

[277] Mills v. Kingport Times-News, 475 F.Supp. 1005 (W.D. Va. 1979); Mills v. Kingport Times-News, 475 F.Supp. 1005 (W.D. Va. 1979).

[278] Leidholdt v. Larry Flynt Publ'n., 860 F.2d 890 (9th Cir. 1988); Jones v. Am. Broad. Co., Inc., 694 F.Supp. 1542 (M.D. Fla. 1988); DeMoya v. Walsh, 441 So.2d 1120 (Fla. Dist. Ct. App. 1983); Eastern Air Lines, Inc. v. Gellert, 438 So.2d 923 (Fla. Dist. Ct. App. 1983); Lampkin-Asam v. Miami Daily News, 408 So.2d 666 (Fla. Dist. Ct. App. 1981); Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa Ct. App. 1988); Ferlito v. Cecola, 419 So.2d 102 (La. Ct. App. 1982); Grimes v. Stander, 394 So.2d 1332 (La. Ct. App. 1981); Bratt v. Int'l Bus. Mach. Corp., 467 N.E.2d 126 (Mass. 1984); O'Brien v. Lerman, 117 A.D.2d 658 (N.Y. Sup. Ct. 1986); Kersul v. Skulls Angels, 495 N.Y.S.2d 886 (N.Y. Sup. Ct. 1985); Manley v. Manley, 353 S.E.2d 312 (S.C. Ct. App. 1987); Emerson v. Nehls, 287 N.W.2d 808 (Wis. 1980).

Eastern Air Lines, Inc. v. Gellert, 438 So.2d 923 (Fla. Dist. Ct. App. 1983)("paranoid," *id.* at 926); Lampkin-Asam v. Miami Daily News, 408 So.2d 666 (Fla. Dist. Ct. App. 1981)"almost paranoical," *id.* at 667, n.1); Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa Ct. App. 1988)("treated by a psychiatrist," *id.* at xx); Ferlito v. Cecola, 419 So.2d 102 (La. Ct. App. 1982)("in need of a psychiatrist," *id.* at 104); Grimes v. Stander, 394 So.2d 1332 (La. Ct. App. 1981)("paranoid schizophrenia," *id.* at 1334); Bratt v. Int'l Bus. Mach. Corp., 467 N.E.2d 126

The majority of the cases from the 1980s clearly construed reputation as property or dealt with an allegation of mental disorder made in a business or professional context.[290] Put bluntly, plaintiffs' jobs or careers were at stake. One of the clearest examples was found in *Higgins v. Gordon Jewelry Corp.*, filed by a woman who lost her job at a jewelry store when a company executive learned that "she had been treated by a psychiatrist for past emotional problems and that she had used drugs."[291] In another case, an airline pilot sued his employer after a company spokesman was quoted in a newspaper describing the pilot as "paranoid."[292] When asked why the pilot was allowed to continue flying for the airline, the spokesman was quoted as saying, "It's awfully hard to fire anyone these days. Anyway, we have three of them in the cockpit. Know

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(Mass. 1984)("paranoid and should see a psychiatrist," *id.* at 130); Manley v. Manley, 353 S.E.2d 312 (S.C. Ct. App. 1987)("mentally ill," *id.* at 313); Emerson v. Nehls, 287 N.W.2d 808 (Wis. 1980)("mentally ill," *id.* at 809).

[280] Grimes v. Stander, 394 So.2d 1332 (La. Ct. App. 1981)("paranoid schizophrenia," *id.* at 1334);

[281] Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa Ct. App. 1988)("treated by a psychiatrist," *id.*).

[282] *See, e.g.*, Eastern Air Lines, Inc. v. Gellert, 438 So.2d 923 (Fla. Dist. Ct. App. 1983); Bratt v. Int'l Bus. Mach. Corp., 467 N.E.2d 126 (Mass. 1984).

[283] Ferlito v. Cecola, 419 So.2d 102 (La. Ct. App. 1982).

[284] Jones v. Am. Broad. Co., Inc., 694 F.Supp. 1542 (M.D. Fla. 1988); Leidholdt v. Larry Flynt Publ'n., 860 F.2d 890 (9th Cir. 1988); DeMoya v. Walsh, 441 So.2d 1120 (Fla. Dist. Ct. App. 1983); O'Brien v. Lerman, 117 A.D.2d 658 (N.Y. Sup. Ct. 1986); Kersul v. Skulls Angels, 495 N.Y.S.2d 886 (N.Y. Sup. Ct. 1985).

[285] O'Brien v. Lerman, 117 A.D.2d 658 (N.Y. Sup. Ct. 1986), at 659; Kersul v. Skulls Angels, 495 N.Y.S.2d 886 (N.Y. Sup. Ct. 1985), at 887.

[286] DeMoya v. Walsh, 441 So.2d 1120 (Fla. Dist. Ct. App. 1983).

[287] Leidholdt v. Larry Flynt Publ'n., 860 F.2d 890 (9th Cir. 1988), at 894.

[288] Jones v. Am. Broad. Co., Inc., 694 F.Supp. 1542 (M.D. Fla. 1988), at 1552.

[289] Leidholdt v. Larry Flynt Publ'n., 860 F.2d 890 (9th Cir. 1988), at 894; DeMoya v. Walsh, 441 So.2d 1120 (Fla. Dist. Ct. App. 1983), at 1121.

[290] DeMoya v. Walsh, 441 So.2d 1120 (Fla. Dist. Ct. App. 1983); Eastern Air Lines, Inc. v. Gellert, 438 So.2d 923 (Fla. Dist. Ct. App. 1983); Lampkin-Asam v. Miami Daily News, 408 So.2d 666 (Fla. Dist. Ct. App. 1981); Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa Ct. App. 1988); Bratt v. Int'l Bus. Mach. Corp., 467 N.E.2d 126 (Mass. 1984); O'Brien v. Lerman, 117 A.D.2d 658 (N.Y. Sup. Ct. 1986); Kersul v. Skulls Angels, 495 N.Y.S.2d 886 (N.Y. Sup. Ct. 1985).

[291] Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa Ct. App. 1988).

what I mean?"[293] The court held that the statement was indeed defamatory; it suggested that the pilot had a condition that was incompatible with the proper exercise of his profession.[294]

Only two cases from the 1980s contained evidence of reputation being construed as dignity. One was *Manley v. Manley,* filed by a woman who sued her family over her involuntary commitment to a state psychiatric facility following a murder-suicide threat.[295] The court acknowledged that an imputation of mental disorder was defamatory because of the "likelihood that the person charged will be deprived of social intercourse."[296] The other case also involved an involuntary transfer to a state mental hospital, but this time the plaintiff was an inmate in a county jail.[297] The pro se plaintiff argued that the act "leaves an unjust, cruel and illegal blot" upon his name.[298]

Most cases from the 1980s resulted from interpersonal communications[299] rather than from media reports,[300] continuing the shift away from media-driven cases. Nearly half the opinions from this time period resulted from statements made by a defendant who had power or influence over the plaintiff,[301] but in none did the plaintiff find a sympathetic ear in court. In both

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[292] Eastern Air Lines, Inc. v. Gellert, 438 S.2d 923 (Fla. Dist. Ct. App. 1983), at 926.
[293] *Id.* at 928.
[294] However, the court struck down a punitive damages verdict against the airline because the record did not show that the employer was at fault The plaintiff provided no evidence to show that the airline knew its spokesman had defamed the pilot. Id. at 928-929.
[295] 353 S.E.2d 312 (S.C. Ct. App. 1987).
[296] *Id.* at 315.
[297] Emerson v. Nehls, 287 N.W.2d 808 (Wis. 1980).
[298] *Id.* at 809.
[299] DeMoya v. Walsh, 441 So.2d 1120 (Fla. Dist. Ct. App. 1983); Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa Ct. App. 1988);); Ferlito v. Cecola, 419 So.2d 102 (La. Ct. App. 1982);); Grimes v. Stander, 394 So.2d 1332 (La. Ct. App. 1981); Bratt v. Int'l Bus. Mach. Corp., 467 N.E.2d 126 (Mass. 1984); O'Brien v. Lerman, 117 A.D.2d 658 (N.Y. Sup. Ct. 1986); Kersul v. Skulls Angels, 495 N.Y.S.2d 886 (N.Y. Sup. Ct. 1985); Manley v. Manley, 353 S.E.2d 312 (S.C. Ct. App. 1987); Emerson v. Nehls, 287 N.W.2d 808 (Wis. 1980).
[300] Leidholdt v. Larry Flynt Publ'n., 860 F.2d 890 (9th Cir. 1988)(magazine); Jones v. Am. Broad. Co., Inc., 694 F.Supp. 1542 (M.D. Fla. 1988)(television); Eastern Air Lines, Inc. v. Gellert, 438 So.2d 923 (Fla. Dist. Ct. App. 1983)(newspaper); Lampkin-Asam v. Miami Daily News, 408 So.2d 666 (Fla. Dist. Ct. App. 1981)(newspaper).
[301] Eastern Air Lines, Inc. v. Gellert, 438 So.2d 923 (Fla. Dist. Ct. App. 1983)(spokesman for employer); Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa Ct. App. 1988)(employer); Bratt v. Int'l Bus. Mach. Corp., 467 N.E.2d 126 (Mass. 1984)(employer); Kersul v. Skulls Angels, 495 N.Y.S.2d 886 (N.Y. Sup. Ct. 1985)(employer); Manley v. Manley, 353 S.E.2d 312 (S.C. Ct. App. 1987)(family members who handled her involuntary commitment

cases that involved involuntary commitment of the plaintiff to a mental hospital, the court emphasized the good-faith efforts made by the defendants. In *Manley*, the case filed by a woman against her family, the court determined that the alleged defamatory statements were qualifiedly privileged.[302] In addition, the court said the family had "at least a moral duty to protect their mother from harming herself, their father and others."[303] In the inmate's case, the court noted that the sheriff had acted within his statutory authority.[304]

Privilege played a role in some of the employment-related cases that showed sympathy for the defendant. *Higgins*, the case filed by the fired jewelry store employee, the court reversed and remanded for a new trial a jury verdict in favor of the plaintiff.[305] The court agreed with the defendant jewelry store that the court erred in failing to submit to the jury the defense of qualified privilege.[306] In a case filed by an IBM employee who complained that too many coworkers learned that the company physician had deemed him paranoid and urged him to see a psychiatrist, the court held that an employer had a "conditional privilege to disclose defamatory information concerning an employee when the publication is reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job."[307]

During the 1980s, mental disorder was established by medical diagnosis or inferred from behavior — and sometimes both. When a man who had been a mental patient filed a defamation case against a surgeon, the court discredited the man's testimony, saying that it, "in light of his mental condition (paranoid schizophrenic), was unworthy of belief."[308] The IBM employee

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to a mental hospital); Emerson v. Nehls, 287 N.W.2d 808 (Wis. 1980)(sheriff in charge of county jail in which plaintiff was incarcerated).

[302] Manley v. Manley, 353 S.E.2d 312 (S.C. Ct. App. 1987), at 315.

[303] *Id.*

[304] Emerson v. Nehls, 287 N.W.2d 808 (Wis. 1980), at 809.

[305] Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa Ct. App. 1988).

[306] *Id.*

[307] Bratt v. Int'l Bus. Mach. Corp., 467 N.E.2d 126 (Mass. 1984), at 129.

[308] Grimes v. Stander, 394 So.2d 1332 (La. Ct. App. 1981)

mentioned earlier objected to the diagnosis of paranoia by the company's general practitioner.[309] The plaintiff in *Manley* said a psychiatrist "accused [her] of being mentally ill and caused her to be admitted"[310] to a state hospital for the insane.[311] Manley was committed after stating that she planned to take her life and the life of her father,[312] which provides us with a behavioral rationale for the allegation as well as a professional medical opinion. Behavior also led to the involuntary hospitalization of the inmate mentioned earlier. He was in the seventh day of a hunger strike when he was transferred from the jail to the hospital.[313] The plaintiff in *Higgins* was fired for admitting being treated by a psychiatrist for past behavior that included drug use and a suicide attempt.[314] The airline spokesman accused the pilot of being paranoid because the pilot had written "some very odd letters to the FBI"[315] and had accused his employer of trying to "crash a plane in order to kill him."[316]

Defamation in interpersonal communication: 1990s

Eight opinions dealing with defamation and mental disorder were published during this decade.[317] They were evenly divided between medicalized allegations[318] and hyperbolic allegations.[319] All of the medicalized allegations involved discussion of health care professionals,[320] suggesting the increasing importance of these authorities in the ascertainment of mental disorder. Most of the medicalized allegations involved workplace disputes, and provide evidence of the harm that such an allegation could cause. One plaintiff was discharged from the Air Force for reasons related to his "mental capacity."[321] Another was told by her employer to take medical leave following her claims that coworkers were "putting the evil eye or spells on her."[322] Yet another was not hired for a post office job after its physician said the plaintiff had a "personality disorder."[323]

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[309] Bratt v. Int'l Bus. Mach. Corp., 467 N.E.2d 126 (Mass. 1984), at 129.

[310] Manley v. Manley, 353 S.E.2d 312 (S.C. Ct. App. 1987), at 313.

[311] *Id.*

[312] *Id.*

[313] Emerson v. Nehls, 287 N.W.2d 808 (Wis. 1980).

[314] Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa Ct. App. 1988), at xx.

[315] Eastern Air Lines, Inc. v. Gellert, 438 So.2d 923 (Fla. Dist. Ct. App. 1983), at 926.

[316] *Id.*

[317] Hunt v. U.S. Air Force, 848 F.Supp. 1190 (E.D. Pa. 1994); Hampton v. Conso Prods., Inc., 808 F.Supp. 1227 (D.S.C. 1992); Foretich v. Advance Magazine Publ'rs., Inc., 765 F.Supp. 1099 (D.D.C. 1991); Pease v. Intl'l Union of Operating Eng'rs., 567 N.E.2d 614 (Ill. App. Ct. 1991); Hohlt v. Complete Health Care, Inc., 936 S.W.2d 223 (Mo. Ct. App. 1996); Polish-Am. Immigration Relief Comm., Inc. v. Relax, 596 N.Y.S.2d 756 (N.Y. Super. Ct. 1993); Kryeski v. Schott, 626 A.2d 595 (Pa. Super. 1993); Rand v. Miller, 408 S.E.2d 655 (W.Va. 1991).

[318] Hunt v. U.S. Air Force, 848 F.Supp. 1190 (E.D. Pa. 1994); Hampton v. Conso Prods., Inc., 808 F.Supp. 1227 (D.S.C. 1992); Foretich v. Advance Magazine Publ'rs., Inc., 765 F.Supp. 1099 (D.D.C. 1991); Rand v. Miller, 408 S.E.2d 655 (W.Va. 1991).

Cases arising from rhetorical hyperbole were similar to those from the past two decades. Plaintiffs complained of being called "crazy,"[324] "dealing with half a deck"[325] and of being accused of working in a "madhouse."[326] Two of them arose from workplace disputes.[327] Courts deemed such comments nonactionable and described them instead as, at worst, "discourteous"[328] or a "vigorous epithet."[329]

Medicalized allegations arising from workplace disputes were based on the concept of reputation as property; these plaintiffs' employment was in some way compromised by the

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[319] Pease v. Intl'l Union of Operating Eng'rs., 567 N.E.2d 614 (Ill. App. Ct. 1991); Hohlt v. Complete Health Care, Inc., 936 S.W.2d 223 (Mo. Ct. App. 1996); Polish-Am. Immigration Relief Comm., Inc. v. Relax, 596 N.Y.S.2d 756 (N.Y. Super. Ct. 1993); Kryeski v. Schott, 626 A.2d 595 (Pa. Super. 1993).

[320] Hunt v. U.S. Air Force, 848 F.Supp. 1190 (E.D. Pa. 1994)("diagnoses regarding plaintiff's mental capacity," id. at 1194; Hampton v. Conso Prods., Inc., 808 F.Supp. 1227 (D.S.C. 1992)("the management of the plant felt she required medical attention," *id.* at 1231); Foretich v. Advance Magazine Publ'rs., Inc., 765 F.Supp. 1099 (D.D.C. 1991)("deposition made by … a clinical psychologist," *id.* at 1104); Rand v. Miller, 408 S.E.2d 655 (W.Va. 1991)(physician's statement that "after reviewing [the plaintiff's] past medical history, a personality disorder is detected," *id* at 656).

[321] Hunt v. U.S. Air Force, 848 F.Supp. 1190 (E.D. Pa. 1994), at 1194.

[322] Hampton v. Conso Prods., Inc., 808 F.Supp. 1227 (D.S.C. 1992), at 1130-1131.

[323] Rand v. Miller, 408 S.E.2d 655 (W.Va. 1991), at 656).

[324] Hohlt v. Complete Health Care, Inc., 936 S.W.2d 223 (Mo. Ct. App. 1996), at 224; Kryeski v. Schott, 626 A.2d 595 (Pa. Super. 1993), at 596.

[325] Pease v. Intl'l Union of Operating Eng'rs., 567 N.E.2d 614 (Ill. App. Ct. 1991), at 616.

[326] Polish-Am. Immigration Relief Comm., Inc. v. Relax, 596 N.Y.S.2d 756 (N.Y. Super. Ct. 1993), at 371.

[327] Pease v. Intl'l Union of Operating Eng'rs., 567 N.E.2d 614 (Ill. App. Ct. 1991); Kryeski v. Schott, 626 A.2d 595 (Pa. Super. 1993).

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allegation.[330] Several other cases arose from employment or business situations but contained little discussion of the notion of reputation, making it difficult to discern how it was construed.[331] In still other cases, the concept of reputation was unexplicated.[332]

Most of the disputes in the 1990s arose from interpersonal communication.[333] All of the interpersonal communication cases involved a defendant who had power over the plaintiff,[334] and once again, the defense of privilege was discussed. In the case brought by the woman who was turned down for a post office job, the court stated that "a physician who is hired by an employer to make … a report [on a prospective employee's health] have a qualified privilege with regard to matters contained therein."[335] In a case filed by a man who objected to a social worker's critical report about his family, the court said the social worker had a qualified privilege to make the comments.[336]

Few claims arose from mass media reports in the 1990s, and none of them went forward.[337] Courts in these cases wrote off the alleged defamation as nonactionable rhetorical

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[328] Hohlt v. Complete Health Care, Inc., 936 S.W.2d 223 (Mo. Ct. App. 1996), at 224.

[329] Kryeski v. Schott, 626 A.2d 595 (Pa. Super. 1993), at 601.

[330] Hunt v. U.S. Air Force, 848 F.Supp. 1190 (E.D. Pa. 1994)(discharged from the service); Hampton v. Conso Prods., Inc., 808 F.Supp. 1227 (D.S.C. 1992)(urged to take medical leave); Rand v. Miller, 408 S.E.2d 655 (W.Va. 1991)(turned down for job).

[331] Pease v. Intl'l Union of Operating Eng'rs., 567 N.E.2d 614 (Ill. App. Ct. 1991); Polish-Am. Immigration Relief Comm., Inc. v. Relax, 596 N.Y.S.2d 756 (N.Y. Super. Ct. 1993); Kryeski v. Schott, 626 A.2d 595 (Pa. Super. 1993).

[332] Foretich v. Advance Magazine Publ'rs, Inc., 765 F.Supp. 1099 (D.D.C. 1991); Hohlt v. Complete Health Care, Inc., 936 S.W.2d 223 (Mo. Ct. App. 1996).

[333] Hunt v. U.S. Air Force, 848 F.Supp. 1190 (E.D. Pa. 1994)(workplace documents); Hampton v. Conso Prods., Inc., 808 F.Supp. 1227 (D.S.C. 1992)(workplace conversation); Hohlt v. Complete Health Care, Inc., 936 S.W.2d 223 (Mo. Ct. App. 1996)(conversation); Kryeski v. Schott, 626 A.2d 595 (Pa. Super. 1993)(conversation); Rand v. Miller, 408 S.E.2d 655 (W.Va. 1991)(medical report).

[334] Hunt v. U.S. Air Force, 848 F.Supp. 1190 (E.D. Pa. 1994)(military officers); Hampton v. Conso Prods., Inc., 808 F.Supp. 1227 (D.S.C. 1992)(company executives); Hohlt v. Complete Health Care, Inc., 936 S.W.2d 223 (Mo. Ct. App. 1996)(social worker); Kryeski v. Schott, 626 A.2d 595 (Pa. Super. 1993)(boss' girlfriend); Rand v. Miller, 408 S.E.2d 655 (W.Va. 1991)(company physician).

[335] Rand v. Miller, 408 S.E.2d 655 (W.Va. 1991), at 659. The defamation claim failed because the statute of limitations had expired.

[336] Hohlt v. Complete Health Care, Inc., 936 S.W.2d 223 (Mo. Ct. App. 1996), at 225.

[337] Foretich v. Advance Magazine Publ'rs., Inc., 765 F.Supp. 1099 (D.D.C. 1991)(magazine); Pease v. Intl'l Union of Operating Eng'rs., 567 N.E.2d 614 (Ill. App. Ct. 1991)(newspaper); Polish-Am. Immigration Relief Comm., Inc. v. Relax, 596 N.Y.S.2d 756 (N.Y. Super. Ct. 1993)(magazine).

hyperbole[338] or far-fetched innuendo.[339] The offending statements included "He's dealing with half a deck … I think he's crazy,"[340] and the claim that an organization was a "madhouse."[341] When it was possible to discern how the existence of mental disorder was established it was either by diagnosis[342] or by the court's own inference from the plaintiff's behavior.[343]

Stigma persists: Early twenty-first century

Four opinions have been published so far during the current decade.[344] In these cases we see the courts distinguishing between rhetorical hyperbole, clinical terms that have entered common parlance, and a description of behavior that could be viewed as that of a mentally disordered individual. Some of these ideas are illustrated in *Weyrich v. The New Republic, Inc.*,[345] in which a federal appeals court held that the plaintiff could go forward with a claim over a magazine article that he said portrayed him as mentally unstable.

The plaintiff, Paul Weyrich, a conservative political leader, claimed the article attributed to him the "diagnosable mental condition of paranoia."[346] The offending words were: "Weyrich began to experience sudden *bouts of pessimism and paranoia* — early symptoms of the nervous breakdown that afflicts conservatives today."[347] The court rejected that particular claim, stating that "paranoia" was "used in the article as a popular, not clinical, term."[348] The passage was deemed protected political commentary and therefore not actionable.

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[338] Pease v. Intl'l Union of Operating Eng'rs, 567 N.E.2d 614 (Ill. App. Ct. 1991); Polish-Am. Immigration Relief Comm., Inc. v. Relax, 596 N.Y.S.2d 756 (N.Y. Super. Ct. 1993).

[339] Foretich v. Advance Magazine Publ'rs., Inc., 765 F.Supp. 1099 (D.D.C. 1991).

[340] Pease v. Intl'l Union of Operating Eng'rs., 567 N.E.2d 614 (Ill. App. Ct. 1991), at 616.

[341] Polish-Am. Immigration Relief Comm., Inc. v. Relax, 596 N.Y.S.2d 756 (N.Y. Super. Ct. 1993), at 757.

[342] Hunt v. U.S. Air Force, 848 F.Supp. 1190 (E.D. Pa. 1994); Hampton v. Conso Prods., Inc., 808 F.Supp. 1227 (D.S.C. 1992).

[343] Rand v. Miller, 408 S.E.2d 655 (W.Va. 1991).

[344] Weyrich v. The New Republic, Inc., 235 F.3d 617 (D.C. Cir. 2001); Miracle v. New Yorker Magazine, 190 F.Supp.2d 1192 (D. Hawai'i 2001); Brown v. O'Bannon, 84 F.Supp.2d 1176 (D. Colo. 2000); Rizvi v. St. Elizabeth Hosp. Med. Ctr., 765 N.E.2d 395 (Ohio App. 7 Dist. 2001).

[345] 235 F.3d 617 (D.C. Cir. 2001).

[346] *Id.* at 620.

[347] *Id.* at 621.

But the court accepted the plaintiff's claim that the article's depiction of Weyrich's behavior was capable of defamatory meaning because it made him sound mentally unstable. For example, the article described an incident in which Weyrich became "a volcano of screaming" and was "spitting and frothing at the mouth. … We were ready to get him a room right next to Hinckley."[349] The article also described Weyrich as having a "famous temper."[350] The court concluded: "There is no doubt that a reasonable person, reading the article's repeated tale of appellant's volatile temper and apparent emotional instability, could very well conclude that appellant is an emotionally unstable individual *unfit for his trade or profession*."[351] The *Weyrich* court essentially determined that the behavior attributed to the plaintiff could be viewed at that of a mentally disordered individual.

In keeping with the trend from the previous decade, courts deemed the terms "crazy"[352] and "nuts"[353] nonactionable rhetorical hyperbole. Also nonactionable was a crisis center employee's description of a caller as "suicidal." The statement could not be "unmistakably recognized as injurious,"[354] the court stated; and since the plaintiff had not alleged special damages, the court dismissed her claim. Because it is still early in the decade, it is difficult to make any more generalizations about trends during this time period. However, it is possible to give a brief descriptive overview. The concept of reputation as property was apparent in *Weyrich* and in a case filed by a physician who objected to being called "crazy" in a professional context.[355] The concept of reputation in the other two cases was not well explicated but did not involve business situations.[356] Cases from the current decade have been evenly divided between those arising from interpersonal communication[357] and those arising from media reports.[358] Defendants were not people with power over the plaintiff.[359]

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[348] *Id.*
[349] *Id.*
[350] *Id.* at 626.
[351] *Id.* at 628 (emphasis added).
[352] Rizvi v. St. Elizabeth Hosp. Med. Ctr., 765 N.E.2d 395 (Ohio App. 7 Dist. 2001).

Analysis

Over the past century, claims of defamation based on an imputation of mental derangement have changed along several dimensions. The nature of the allegations has changed; the concept of reputation underlying the case has changed; the medium in which the offending comment occurred has changed; and the nature of the defendant has changed. What has remained remarkably persistent is the evidence that the age-old stigma associated with mental disorder has survived.

In the final years of the nineteenth century and early years of the twentieth century, courts found actionable both medicalized and hyperbolic allegations of mental disorder. Calling someone "crazy" was actionable,[360] as was alleging "insanity."[361] This corresponded to the two prevailing concepts of reputation that informed the cases from this time period: dignity and property. Reputation was construed as one's membership in civil society as well as one's business or professional standing. Allegations of mental disorders occurred in newspaper articles

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[353] Miracle v. New Yorker Magazine, 190 F.Supp.2d 1192 (D. Hawai'i 2001); Brown v. O'Bannon, 84 F.Supp.2d 1176 (D. Colo. 2000).
[354] *Id.* at 1181.
[355] Rizvi v. St. Elizabeth Hosp. Med. Ctr., 765 N.E.2d 395 (Ohio App. 7 Dist. 2001);
[356] Miracle v. New Yorker Magazine, 190 F.Supp.2d 1192 (D. Hawai'i 2001); Miracle v. New Yorker Magazine, 190 F.Supp.2d 1192 (D. Hawai'i 2001)(magazine).
[357] Brown v. O'Bannon, 84 F.Supp.2d 1176 (D. Colo. 2000).
[358] Weyrich v. The New Republic, Inc., 235 F.3d 617 (D.C. Cir. 2001); Miracle v. New Yorker Magazine, 190 F.Supp.2d 1192 (D. Hawai'i 2001)(magazine article quoting acquaintance); Brown v. O'Bannon, 84 F.Supp.2d 1176 (D. Colo. 2000)(crisis center employee); Rizvi v. St. Elizabeth Hosp. Med. Ctr., 765 N.E.2d 395 (Ohio App. 7 Dist. 2001)(coworker).
[359] Weyrich v. The New Republic, Inc., 235 F.3d 617 (D.C. Cir. 2001)(magazine article quoting lobbyist).
[360] Wertz v. Lawrence, 179 P. 813 (Colo. 1919), *aff'd,* 195 P. 647 Colo. 1921).
[361] Coulter v. Barnes, 205 P. 943 (Colo. 1922).

and in interpersonal communications about equally. Peers and employers made the offending allegations. The allegation of mental disorder was based on either the plaintiff's behavior or the opinion of an authority.

By the middle of the twentieth century, a shift occurred in the nature of the imputations of mental derangement. Most were medicalized terms or allegations of institutionalization for mental illness. This was a turning point in the way courts decided whether an imputation of mental disorder was defamatory. They generally held that medicalized imputations of mental derangement were actionable, while rhetorical or hyperbolic ones were not. In contrast to the early years of the century, an allegation of "crazy" was no longer actionable.[362] This view has persisted into the early twenty-first century cases.

The dominant conception of reputation was dignity at mid-century,[363] and shifted to property for the remainder of the century. Defendants were a mix of peers and people with power over the plaintiff, such as a judge[364] and a physician.[365] Officials involved in institutionalization successfully used the defense of privilege. In one case, a physician signed legal papers committing a woman to a mental institution.[366] The court held that the physician's affidavit, being part of a judicial proceeding, was absolutely privileged.[367] Similarly, a letter to the superintendent of a mental institution stating, "Why do you turn loose patients like him," was privileged because the institution had an interest in the patient about whom the statement was made.[368]

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[362] O'Brien v. Lerman, 117 A.D.2d 658 (N.Y. Sup. Ct. 1986); Kersul v. Skulls Angels, 495 N.Y.S.2d 886 (N.Y. Sup. Ct. 1985).

[363] *See* note 156, *supra*, and accompanying text.

[364] Kenney v. Hatfield, 88 N.W.2d 535 (Mich. 1958)

[365] Jarman v. Offutt, 80 S.E.2d 248 (N.C. 1954).

[366] Jarman v. Offutt, 80 S.E.2d 248 (N.C. 1954).

[367] *Id.* at 253.

[368] Campbell v. Jewish Comm. for Personal Service, 271 P.2d 185 (Cal. Dist. Ct. App. 1954).

Also at mid-century, there was a shift in the situations that gave rise to these lawsuits. In earlier years, cases arose from a variety of situations — newspaper articles, comments by peers, comments by authorities and workplace situations. Starting in the 1960s, claims arising from the media declined and those arising from interpersonal communications increased. Moreover, the interpersonal communications arose not from peer-to-peer snipes, as in the early part of the century, but from allegations of mental disorder made by a person who had power over the plaintiff, such as an employer. Allegations often occurred in workplace situations and sometimes had cost plaintiffs their jobs. Clearly, the stakes associated with an imputation of mental disorder had gotten quite high, at least according today's sensibilities about work and social status.

What might explain this shift in the origin of the cases to workplace interpersonal communications? One possibility is that it was a result of the deinstitutionalization that began in 1956. People who were at one time institutionalized were now on the street and, presumably, the job market. The prevalence of workplace-related cases also helps to explain the increased emphasis on reputation as property rather than dignity. Another possible reason for the shift away from cases claiming an assault on one's social standing is that the stigma from mental disorder may have begun to wane in the private sphere of activity. Mental disorder has become a common topic of discussion in the popular media, suggesting some modest level of acceptance of the condition.

The mid-century shift to the concept of reputation as property presents a paradox with regard to the resolution of these defamation claims. At the same time that reputational damage from an allegation of mental disorder began to be calculated primarily in terms of dollars lost in the workplace, it became more difficult for plaintiffs to clear their names. Employers increasingly asserted a qualified privilege to discuss the fitness of employees for their duties, and courts accepted it. Similarly, courts began to recognize a privilege for physicians to discuss the mental health of their patients, as in the case of the terminated Navy engineer and the woman who was passed over for a post office job. This is significant because, as we have seen throughout the case review, an accepted way to determine mental disorder was through a medical diagnosis — an apparent result of the medicalization of the condition. Courts accepted physician's opinions regarding a person's mental disorder as highly credible. Yet these opinions were also difficult to challenge because courts deemed them qualifiedly privileged.

The competing interests in these cases varied according to whether the claim arose from a workplace situation or a media report. The cases arising from workplace situations pitted the plaintiff's interest in protecting reputation and its pecuniary value against the employer's interest in hiring competent employees. Courts gave employers much leeway in discussing the mental health of their employees or prospective employees — sometimes too much. We have seen that an allegation of mental disorder can harm one's career. Courts cannot presume to change what society finds defamatory, such as mental disorder, but they can see that employers' privilege is narrowly construed and not abused.

In some cases, employers and courts appeared to place great emphasis on the diagnosis or "label" that was given to the plaintiff's condition. For example, the diagnosis of a "personality disorder" apparently was a key reason that plaintiff Rand was not hired for the post office job.[369] Yet there is no discussion of the requirements of the job and how the alleged disorder prevented her from fulfilling those requirements. There should be. Similarly, in *Hoesl,* a doctor's report stated that the plaintiff was unfit for his job because of a psychiatric disorder, but again, there is no discussion of what the job requirements were and how a psychiatric disorder would prevent him from carrying them out.[370] Moreover, it is unclear how the physician knew that a psychiatric disorder made the individual unfit for a particular job, since it is the hiring manager who would be most familiar with the requirements of the position. Perhaps the physicians in *Rand* and *Hoesl* can have the benefit of the doubt, since they were paid by the employer and thus might have been well acquainted with the requirements of various jobs.

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[369] Rand v. Miller, 408 S.E.2d 655 (W.Va. 1991).

But the *Higgins* case, filed by the terminated jewelry store clerk, is problematic. Pre-employment tests revealed she had received psychiatric treatment in the past, and the store hired her anyway. She proved to be a "model employee" but was fired because of her past medical problems.[371] The court agreed with the defendant that the defense of qualified privilege should have been submitted to the jury.[372] The court, however, should have found that the privilege had been abused as a matter of law, because there is no evidence that Higgins' past treatment was in any way a relevant topic for company managers to discuss. Her job performance was satisfactory.

Cases arising from media reports generally weighed the plaintiff's interest in protecting reputation against the speaker's First Amendment right to discuss matters of public concern. In the nineteenth century, such First Amendment freedoms were not well developed, so it is no surprise that the topic was not broached in the early cases.[373] In the middle of the twentieth century, courts still were rejecting the public interest defense claims of newspapers.[374] Barry Goldwater won his 1969 claim against the magazine that published his "psychobiography"; the court was satisfied that the article could be viewed as having been published with actual malice.[375]

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[370] Hoesl v. Kasuboski, 451 F.Supp. 1170 (N.D. Cal. 1978), at 1173.
[371] Higgins v. Gordon Jewelry Corp. 433 N.W.2d 306 (Iowa Ct. App. 1988).
[372] *Id.*
[373] Wood v. Boyle, 35 A.853 (Pa. 1896) did contain a reference to privilege based on the fact that the plaintiff was a public official. The court rejected the argument. *Id.*
[374] MacRae v. Afro-Am. Co., 172 F.Supp. 184 (E.D. Pa. 1959)(rejecting conditional privilege defense for comments made about a university president's wife); Wemple v. Delano, 65 N.Y.S.2d 322 (N.Y. Sup. Ct. 1946)(rejecting the justification that the article reporting on the official proceedings of a municipal board.)

But, following the U.S. Supreme Court's decision in *New York Times v. Sullivan*, broad protections developed for speech about matters of public concern. By the 1970s, courts began to embrace public interest-related defenses, and this is reflected in the mental disorder claims. The court in *Fram,* the case filed by the cab company executive, stated that the television news show that gave rise to the case dealt with a matter of public concern.[376] Furthermore, Fram was a public figure and failed to provide evidence of actual malice.[377] Similarly, in *Demers*, in which an airport executive was called a "demented old man … [who] might chop up our airplanes with an axe"[378] at an airport commission meeting, the court held that the comment might be qualifiedly privileged because it was made at the meeting of a public body.[379] By the 1980s, imputations of mental derangement that occurred in media reports were being deemed nonactionable opinion.[380] *Hustler's* description the plaintiff, an anti-pornography activist, using the phrases wacko, vengeful hysteria, twisted and bizarre paranoia, was protected as an "expression of opinion in an important public debate."[381] In the 1990s, imputations of mental derangement that occurred in media reports were found nonactionable hyperbole.

Recently, however, a federal district court set a limit on "hyperbolic description" that portrayed a man as mentally unstable. The federal appeals court that decided *Weyrich v. The New Republic, Inc.*, drew a line when dealing with anecdotes based on verifiable facts and rejected the notion that the article was protected political commentary.[382] As discussed in the preceding section, a magazine article described several episodes in which Weyrich's behavior was out of the ordinary.[383] The court remanded the case for determination of whether the defamatory statements were false. It added, "We are mindful that trial courts are understandably wary of allowing unnecessary discovery where First Amendment values might be threatened,"[384] and suggested that the lower court limit discovery to falsity, possibly avoiding the more burdensome discovery of evidence of actual malice.[385]

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[375] Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), at 328.
[376] Fram v. Yellow Cab Co., 380 F.Supp. 1314 (W.D. Pa. 1971), at 1333.
[377] *Id.* at 1338.
[378] Demers v. Meuret, 512 P.2d 1348 (Or. 1973).
[379] *Id.* at 1350.
[380] Leidholdt v. Larry Flynt Publ'ns, 860 F.2d 890 (9th Cir. 1988) Lampkin-Asam v. Miami Daily News, 408 So.2d 666 (Fla. Dist. Ct. App. 1981).
[381] Leidholdt v. Larry Flynt Publ'ns, 860 F.2d 890 (9th Cir. 1988), at 894.

The frequency of court decisions on defamation by imputation of mental derangement has decreased since the 1980s. What might explain the decrease? Many new drugs for the treatment of mental disorders have become available in recent.[386] Perhaps the increased use of pharmaceutical treatments for mental disorder has permitted more people to function effectively in the workplace, allowing them to avoid the label of "mentally ill" and its consequences.

Conclusion

An imputation of mental derangement continues to be defamatory under some conditions. Such an imputation is most likely to be actionable if it is a medicalized allegation rather than a hyperbolic comment that can be dismissed as opinion. Adjudicated cases increasingly have arisen from workplace situations in which there is clear evidence that someone's career is threatened by the imputation. Plaintiffs, however, are likely to have difficulty clearing his or her name if the allegation was made by an employer or a physician working for an employer. Courts have held that these speakers have a qualified privilege to comment on a worker's mental health as they relate to the person's fitness for a job. But employers and physicians sometimes labeled employees as mentally disordered without providing any evidence that they were incapable of performing the requirements of a job. Given the pecuniary harm that can clearly result from an allegation of mental disorder, and the ensuing difficulty in exonerating oneself from the charge, courts need to be more mindful of the use of qualified privilege in these cases and keep a closer watch on possible abuse. Mental disorders are costly to society, and stigma contributes to inadequate treatment. The law can address that issue by not allowing needless perpetuation of the stigma.

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[382] 235 F.3d 617 (D.C. Cir. 2001).
[383] *Id.*
[384] *Id.*
[385] *Id.*

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[386] Surgeon General's Report, *supra* note 5, at 68.

PRIVACY VERSUS PUBLIC ACCESS: AN ANALYSIS OF HOW COURTS BALANCE THESE COMPETING SOCIAL INTERESTS WHEN GOVERNMENT RECORDS ARE COMPUTERIZED

by

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PRIVACY VERSUS PUBLIC ACCESS: AN ANALYSIS OF HOW COURTS BALANCE THESE COMPETING SOCIAL INTERESTS WHEN GOVERNMENT RECORDS ARE COMPUTERIZED

When a political consultant requested a copy of the magnetic computer tape Michigan State used to produce its student directory, university officials refused, offering instead a copy of the directory when it was published or an immediate printout of the data on the magnetic tape. Michigan courts were left to resolve the issue: Did the computer format of the data pose an invasion of privacy that warranted blocking access even though the same information would be available to the public on paper? Three members of the Michigan Supreme Court felt it did, reasoning that release of the students' names and addresses on a computer tape "was a more serious invasion of privacy than disclosure in a directory form" because "computer information is readily accessible and easily manipulated."[1]

Three justices, however, disagreed, contending that no reasonable expectation of privacy existed if the information sought was a computer copy of a public record also available in paper. "We cannot accept the conclusion that the Legislature intended to allow a public body to exempt otherwise public records from disclosure by the simple expedient of converting the public record from one form to another," Justice James Ryan reasoned. "Surely such a result would exalt form over substance."[2]

The 3-3 deadlock let stand a lower court ruling denying public access to the computer tape. It also demonstrated that the judicial balancing of informational privacy and public access to

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[1] Kestenbaum v. Michigan State Univ., 414 Mich. 510, 327 N.W.2d 783, 789 (1982) (Fitzgerald, C.J., opinion for affirmance).

[2] *Id.* at 802 (Ryan, J., opinion for reversal) (citing MICH. COMP. LAW § 15.232(e) (1982)).

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government documents – a process already subjective in nature – is exacerbated by the computerized format of records.

This study explores how federal and state courts have struck the balance between informational privacy and public access when the government records involved are computerized. That is, this research examines how courts and judges decide which of those competing social interests is paramount in such situations. Even though courts have been balancing these concepts since at least the 1970s, no other study has thoroughly examined these decisions.

This study uses as its framework the rationales and criteria applied by courts nationwide when the government records are ink and paper. In earlier research, the author had identified six factors that courts used to balance privacy and access rights.[3] The study at hand analyzed how computerization of the requested information affected the way in which those factors were applied and examined if judges' attitudes toward technology, as reflected in the language of their written opinions, influenced their decisions. That is, did they consider computers an inherent threat to personal privacy or as useful tools in furthering public access to government information?

To perform this analysis, an attempt was made to locate every published judicial opinion in which a court balanced a request for computerized government information against a claim of individual privacy. The LEXIS-NEXIS Academic Universe[4] and Media Law Update[5] were

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[3] *Individual Privacy Versus Public Access: An Analysis of the Six Factors Courts Use to Balance These Two Competing Social Interests*, presented to Law Division, Association for Education in Journalism and Mass Communication Convention, Miami: August 7-10, 2002. The six factors are: (1) The nature and validity of the asserted privacy interest and the degree of the invasion of that interest; (2) The extent or value of the public's interest in disclosure; (3) The purpose or objective of the requester seeking disclosure; (4) The availability of the information from other sources; (5) Whether the government promised confidentiality; and (6) Whether it is possible to redact personal information so as to limit the breach of individual privacy. Not every opinion addresses all six factors. However, two or more are routinely used by courts in striking the privacy-access balance.

[4] http://web.lexis-nexis.com/universe. The LEXIS-NEXIS Academic Universe's state and federal case databases were queried using the search string "privacy and public record and computer or magnetic tape." One-hundred and ninety-five hits were received. Of those, fifty-six were determined to be on target because the courts were faced with competing claims of privacy and access to information that the opinions clearly indicated involved records in a computerized format. Cases dealing with expungement of criminal records, sealing of court records, free press-fair trial issues, claims of illegal search and seizure, common law invasion of privacy torts, and discovery in civil and criminal trials were discarded.

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searched for target cases among the trial and appellate courts at the federal and state levels, plus the District of Columbia, Puerto Rico and Virgin Islands. Fifty-eight on-target cases were identified and examined. A key limitation of this study results from the fact that many access-to-records cases are settled at the trial court level and the majority of trial court decisions are unpublished.[6] Another limitation is that for some cases the computer element may not have been recognizable in the judicial opinion, resulting in their exclusion from this research. Even so, this study provides the most complete examination available of these cases.

In nearly all the cases analyzed, courts treated computerized information in the same way that courts had treated paper documents. In most opinions, courts made only passing references to the fact that the public records were available in or had been requested in computer format. The research also revealed that courts applied no new factors when weighing the competing interests. In some cases though, the fact that the information was in an electronic format influenced how the courts applied the six factors.

This research is important because it explains how courts arrive at these decisions and, thus, provides a clearer understanding of the legal issues for people seeking access to government records and for people seeking to shield from general inspection personal information contained in those records. This research also proposes ways to improve the method of balancing these competing social interests when the government information sought is maintained in a computer.

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[5] http://www.rcfp.org/news/. Media Law Update is a biweekly newsletter published by the Reporters Committee for Freedom of the Press and covers legal issues of interest to journalists. The site was queried using the search string "privacy and public record and computer or magnetic tape." This search located two cases not previously identified by the search of the LEXIS-NEXIS Academic Universe databases.

[6] Whenever possible, information about unpublished decisions was obtained from appellate court decisions if they discussed the lower court opinions in sufficient detail. It is recognized that relying on appellate court summaries raises problems related to thoroughness and bias. Nonetheless, these summaries had to be included to obtain the most complete picture of judicial treatment of claims of privacy and access rights to government records.

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Review of the Literature

A search of the literature found three studies of how courts have balanced individual privacy and public access to computerized government records.[7] However, those authors did not purport to examine all such state and federal cases, nor did they always analyze cases in detail, providing instead only a cursory review of some holdings.

In 1990, Eve H. Karasik, in analyzing state court decisions involving different types of personal information stored in computer databases, examined "when it is normatively acceptable to disclose legitimately obtained personal information stored in an automated database to strangers without the subject party's consent."[8] She also examined the values of disclosure and privacy in those cases and explored how courts viewed the role of the computer. She did not study the available federal cases. In 1993, Sigman L. Splichal studied how computer privacy concerns – both practical and philosophical – related to public and media access to computerized government information.[9] In doing so, he analyzed in great detail the U.S. Supreme Court's decision in *Reporter's Committee*[10] and also surveyed some state court decisions regarding the issue of privacy and disclosure in computerized government information. Neither Splichal nor Karasik explained how they selected their cases, and it appears that they did not choose all of the available cases. For example, though the studies are separated by only three years, they examined only nine of the same state cases. Karasik examined seven that were not touched upon by Splichal, who discussed four not dealt with by Karasik. Neither study examined how all the judges defined the rights of privacy and public access and where, if at all, the courts found the legal bases for these rights. In the third study, Martin Halstuk analyzed only seven U.S. Supreme Court opinions involving privacy exemptions under the federal Freedom of Information Act. He asked whether the Court had "fairly balanced the conflicting values of access and privacy within the guidelines established by Congress in the FOIA."[11]

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[7] Eve. H. Karasik, *A Normative Analysis of Disclosure, Privacy, and Computers: The State Cases*, 10 COMPUTER/L. J. 603 (1990); Martin Halstuk, *Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy Have Missed the Target of Legislature Intent*, 4 COMM. L. & POL'Y 111 (1999); and Sigman L. Splichal, The Impact of Computer Privacy Concerns on Access to Government Information (1993) (Ph.D. dissertation, University of Florida). *See also* Splichal, *The Evolution of Computer/Privacy Concerns: Access to Government Information Held in the Balance*, 1 COMM. L. & POL'Y 203 (1996).

[8] Karasik, *supra* note 7, at 604.

[9] Splichal, *supra* note 7, at 23.

[10] Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989).

Because the authors did not analyze the same cases or ask the same questions, it is difficult to find common points among their conclusions. However, Karasik and Splichal did disagree over the willingness of state courts to permit the release of personal information. Karasik said the courts seemed reluctant to forbid disclosure even when the information was requested for an expanded version of the purpose for which it had been collected or for a greater number of people than originally expected.[12] The courts did not even preclude disclosure intended for the requester's personal gain, as opposed to a socially beneficial purpose, Karasik said.[13] Splichal concluded, however, that state courts "generally have been unpredictable" when they attempt to resolve disputes over information held in government computers.[14]

The studies also pointed out different principles used by the state courts and by the U.S. Supreme Court in permitting or denying the release of information. Karasik found that state courts permitted disclosure for "informing the general public" about the activities of government and showed a great deal of judicial deference to statutes that "permit disclosure in support of the public's 'right to know.'"[15] However, Splichal and Halstuk concluded that the U.S. Supreme Court in *Reporter's Committee* had not followed what Congress intended with the FOIA – to establish a philosophy of the fullest possible disclosure. Instead, they said, the Court swung the balance in favor of privacy by broadly interpreting the privacy interests and by narrowly interpreting the public's interest in disclosure to knowing only about the performance of agencies' statutory duties. Both men were particularly critical of the Court's decision in *Reporter's Committee,* which Splichal said provided a potentially powerful weapon to those who wish to shield government information from scrutiny.[16] He noted that several courts have relied on the *Reporter's Committee* opinion in limiting access to government-held information on privacy-related grounds.[17]

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[11] Halstuk, *supra* note 7, at 113.

[12] Karasik, *supra* note 7, at 605-6.

[13] *Id.* at 617.

[14] Splichal, *supra* note 7, at 227.

[15] Karasik, *supra* note 7, at 614.

On the question of how courts viewed the computer, Splichal and Karasik reached similar conclusions. Some courts, they said, supported withholding some information just because it was stored in computers, even if the information was not highly personal. State courts in that category, Karasik said, "viewed the computer as a frightful Orwellian invader of the personal realm."[18] Similarly, Splichal said, a "native fear of technology and the danger it poses for individual freedoms resonates" in the *Reporters Committee* opinion written by Justice Stevens.[19]

Other state courts, however, ignored the computer aspect altogether or discounted the computer's impact on the conflict. They "seem to view the Orwellian cry of the computer as a mere ruse to restrict the flow of information to the public," Karasik wrote.[20] According to Splichal, courts in that category looked beyond the physical form of the information and instead focused on its content.[21] They treated computerized records the same as they would paper records and allowed the same level of access.[22]

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[16] Splichal, *supra* note 7, at 12.

[17] *Id.* at 206.

[18] Karasik, *supra* note 7, at 633.

[19] Splichal, *supra* note 7, at 228.

[20] Karasik, *supra* note 7, at 630.

[21] Splichal, *supra* note 7, at 216.

[22] *Id.* at 220.

Karasik, though, found that some state courts also "championed the computer's anonymity capability as a solution to the disclosure/privacy problem." In other words, the computer's ability to mask identifiers was used to allow access to records and still protect privacy by not connecting the records to individuals.[23] What, if anything, though, did the courts mean by privacy? Karasik concluded that the state cases "indicate that privacy is a conglomerate of various interests inextricably linked to one's sense of self" and "represent attributes which make people complete human beings. Some of these interests are core, such as sexuality, and some are more peripheral, such as personal identifiers. Yet, all of these values seem to add up to what 'me' means and each individual should be sovereign over this 'me.' " She also concluded that the cases "show how people fear that data collection, storage and use will harm their 'me' or sense of self."[24]

To balance the conflicting interests of privacy and public access, Karasik proposed a "normative case-by-case analysis" guided by a three-step inquiry by the courts: (1) consider the disclosure value, or the societal value placed upon the intended use of the requested information; (2) evaluate the privacy value at stake by asking whether it involved a "purely bad thing" that no disclosure value could challenge or a "hurt," which "could be subordinated to disclosure when society deemed disclosure more valuable"; and (3) try to resolve the conflict by using the computer's ability to redact identifiers and "remove the privacy concern altogether to satisfy society's interest in disclosure." If the computer could not be used to resolve the conflict, Karasik said, then a court would have to balance the two valued norms in each circumstance. Karasik conceded that her approach would result in arbitrary ad-hoc balancing in which "adjudicators are given much discretion to shape and select our society's norms."[25]

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[23] Karasik, *supra* note 7, at 630.

[24] *Id.* at 626.

[25] Karasik, *supra* note 7, at 632.

Splichal also proposed a model to define "a reasonable balance between privacy and public access" when computerized government records are sought. His model focused on "the kind of personal information involved, the likelihood that harm would result from disclosure, and the relative strength of the public good derived from disclosure."[26] In determining the public good that could be derived from disclosure, he suggested focusing on the purpose for which the information was requested. Splichal proposed two circles of values, one supporting public access and the other supporting privacy. Each circle had a core immutable value, followed by rings of decreasing values that "tend to be more susceptible to societal changes and more likely to yield to competing social values."[27] However, similarly located rings in the two circles might not always contain identically weighted values, he said. "Ultimately, effective balancing would have to take into account all circumstances and would require, to some extent, the subjective assignment of a privacy or access interest to a particular ring."[28] In other words, Splichal said, "courts would have to do what they have always done – reach the best solution given the individual circumstances of the case."[29]

Karasik, Splichal and Halstuk found that some courts deny public access to computerized records because of the perceived threat to individual privacy while others are more willing to make electronic data available. These studies, however, lacked depth. They examined only a few

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[26] Splichal, *supra* note 7, at 19.

[27] *Id.* at 250, 252-64 (Relative Privacy Values: Core Value, a person's innermost thoughts, feelings, and sentiments; 2nd Ring, intimate information, the disclosure of which could lead to some kind of harm to an individual; 3rd Ring, personal information open to the individual's friends; 4th Ring, personal information that people give up as part of their day-to-day interaction with society, much of which becomes part of the public record or is publicly available from other sources; 5th Ring, personal information freely disclosed to government or business with little expectation of privacy or fear of harm.

Relative Public Access Values: Core Value, information essential for society to understand and assess the workings of government; 2nd Ring, information not directly about government but that contributes to an understanding of government or facilitates the political process; 3rd Ring, information not directly about government but that would facilitate an understanding of social or other issues that collectively contribute to the process of self-governance; 4th Ring, information that individuals could add value to and disseminate in such a way as to benefit society; 5th Ring, information sought for personal reasons; and 6th Ring, information sought for profit reasons alone.).

[28] *Id.* at 252.

[29] *Id.* at 267-8.

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cases on the issue and did not fully explore the factors influencing the courts that were selected. This study, however, continues and expands scholarship in this area by contributing a full analysis of how courts balance the conflicting social interests of personal privacy and public disclosure when government records are computerized.

How Courts Balance Informational Privacy And Public Access To Computerized Government Records

Thirty years ago, a federal district judge conceded that even then computers and electronic databases were "facts of present day life."[30] "Courts can be no more effective than Canute in turning back the tide," wrote Judge Robert L. Carter. "It cannot be contended, at least not seriously, that governmental use of this new technology is constitutionally impermissible."[31] In 1990, the Fourth Circuit Court of Appeals acknowledged that this technology has "provided society with the ability to collect, store, organize, and recall vast amounts of information about individuals."[32] This "information can be useful and even necessary to maintain order and provide communication and convenience in a complex society," the Fourth Circuit said.[33] At the same time, however, the judiciary has recognized that "overzealous data collection and instant data retrieval" pose threats to society.[34] The central problem for courts, said Chief Justice John W. Fitzgerald of the Michigan Supreme Court, "is to determine how the legal system can best insure

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[30] Roe v. Ingraham, 357 F. Supp. 1217, 1222 (S.D.N.Y. 1973).

[31] *Id.*

[32] Walls v. City of Petersburg, 895 F.2d 188, 194-95 (4th Cir. 1990).

[33] *Id.*

[34] Roe v. Ingraham, 357 F. Supp. at 1222. ("I recognize the dangers in a society which permits the government to know the intimacies of its citizens' lives and especially the consequences to those people against whom such information is maliciously or malevolently used. And I realize the potential for individual harm consequent upon errors of fact becoming imprinted upon unforgiving tapes.") *See also* Walls v. City of Petersburg, 895 F.2d 194-95 ("[W]e need to be ever diligent to guard against misuse.").

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[sic] that a proper balance is struck between the traditional libertarian ideals embodied in the concept of privacy and the immense social benefit that computer technology offers."[35]

To understand how courts have attempted to achieve that proper balance, this research begins by discussing where courts found legal bases for a right of public access and a right of informational privacy in the computerized records cases.

Legal Bases For Rights of Public Access And Privacy

Because the requests for computerized government records typically relied upon public records statutes to claim a right of access, state and federal courts relied foremost upon those statutes to determine if the right indeed existed. For example, the New York Court of Appeals noted that state legislators, in enacting that state's Freedom of Information Law, had stated that "government is the public's business and that the public, individually and collectively as represented by a free press, should have access to the records of government in accordance with the provisions of this article."[36]

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[35] Kestenbaum v. Michigan State Univ., 327 N.W.2d 783, 789 (Mich. 1982)(Fitzgerald, C.J., opinion for affirmance)(citing Arthur Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089, 1222 (1969)).

[36] Federation of New York State Rifle & Pistol Clubs, Inc. v. New York City Police Dep't, 535 N.E.2d 279, 280 (N.Y. 1989) (quoting FREEDOM OF INFORMATION ACT, N.Y. PUB. OFF. LAW § 84 (McKinney 1989)). *See also* Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (citing FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552 as amended (1966)); Scottsdale Unified Sch. Dist. No. 48 of Maricopa County v. KPNX Broadcasting Co., 937 P.2d 689, 693 (Ariz. Ct. App. 1997) ("The Public Records Law 'evinces a clear policy favoring disclosure.'" (quoting Carlson v. Pima County, 687 P.2d 1242, 1245 (Ariz. 1984))); Background Info. Servs. v. Office of the State Court Adm'r, 980 P.2d 991, 993 (Colo. Ct. App. 1999) ("The General Assembly has declared in the Open Records Act that, with certain specified exceptions, it is 'the public policy of this state that all public records shall be open for inspection by any person at reasonable times.'" (quoting COLO. REV. STAT. § 24-72-201 (1999))); Maher v. Freedom of Info. Comm'n., 472 A.2d 321, 324-25 (Conn. 1984) (state agency bound "to maintain its records as public records available for public inspection unless these records fall within one of the statutory exemptions to disclosure" (quoting FREEDOM OF INFORMATION ACT, CONN. GEN. STAT. § 1-19 (1984))); Lexington-Fayette Urban County Gov't v. Lexington Herald-Leader Co., 941 S.W.2d 469, 470, 25 Media L. Rep. (BNA) 1759 (Ky. 1997) (Kentucky Open Records Act "articulates public policy as favoring the free and open examination of public records even though such may cause embarrassment or inconvenience to public officials and others." (citing KY. REV. STAT. ANN. § 61.882(4) (Michie/Bobbs-Merrill 1992))); Ellerbe v. Andrews, 623 So. 2d 41, 43 (La. Ct. App. 1993) ("The public has the right to examine public records." (citing LA. REV. STAT. ANN. § 44:1 *et seq.* (West 1992))); Mager v. State, 595 N.W.2d 142, 148 n.22 (Mich. 1999) ("It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." (quoting FREEDOM OF INFORMATION ACT, MICH. COMP. LAWS § 15.231 *et seq.* (1999))).

In only one of the opinions analyzed did a court express concern that a disclosure statute had not been written with computerized government documents in mind. "The conceptual models of the Right-to-Know Law – the minutes of public meetings, the tax assessor's books – do not seem readily adaptable to the data collected in the information age," said the New Jersey Supreme Court in 1992.[37] "We doubt that the Legislature intended that all detailed information a modern computer-based system can generate constitutes records 'required by law to be made, maintained or kept' under the Right-to-Know Law."[38] The court barred disclosure to a newspaper of county public officials' itemized telephone bills for office- and car-phone lines to a newspaper.[39] The trial court had granted the disclosure, concluding that the telephone bills were public records under the state's Right-to-Know Law and that the newspaper's interest in reviewing the bills outweighed any privacy rights of third parties.[40] A divided appellate court had reversed, holding that the public officials' privacy interests were protected by the New Jersey Constitution.[41] The supreme court, in affirming the reversal, said it had to be shown "that the public need for the identity of the parties called outweighs the governmental policies of confidentiality in telephone communications and of executive privilege."[42] The court said that while waiting for the legislative bodies to clarify which records had to be disclosed and which were exempt, "our traditions of openness and hostility to secrecy in government will justly accommodate the concerns expressed

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[37] North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9, 16, 601 A.2d 693, 19 Media L. Rep. 1962 (1992).

[38] *Id.* at 15.

[39] *Id.* at 12. For long-distance and car-phone calls, the telephone bills included "the telephone number called; the date, time, and length of the call; and the charge for the call."

[40] *Id.*

[41] North Jersey Newspaper Co. v. Passaic County Bd. of Chosen Freeholders, 584 A.2d 275, 277-78 (N.J. Super. Ct. App. Div. 1990) (citing N.J. CONST. art. I, § 7).

[42] 127 N.J. at 11.

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here."[43] The court said, "Our common-law standards provide a balanced consideration of the public need for the numbers called and the need for confidentiality."[44]

Three years later, the New Jersey Supreme Court again relied upon the common law in a disclosure case – this time, however, to find a right of access to computerized records that the state's Right-to-Know Law did not provide. In *Higg-A-Rella, Inc. v. County of Essex,*[45] a company selling municipal tax-assessment data to real-estate brokers, attorneys, and appraisers had asked to copy a computer tape containing the tax-assessment records of every municipality in the county.[46] County officials had refused to provide the information on a computer tape even though they readily provided the same information on paper and conceded that copying the computer tapes would involve minimal time and expense.[47]

The trial court had barred the release, holding that the computer tapes were not covered by the state Right-to-Know Law because county officials were not required to maintain them.[48] The judge held that under the common law right of access, the private commercial interest did not outweigh the public officials' right to decide if and for how much they wanted to sell the computer tapes because the government could sell the tapes for profit just as the company

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[43] *Id.* at 17.

[44] *Id.* at 16.

[45] 660 A.2d 1163 (N.J. 1995).

[46] *Id.* at 1166. For each parcel of land, the information included: "1) street address and block and lot numbers; 2) brief description, including lot size and use; 3) assessed value, broken down into land and improvements; 4) whether the parcel is subject to farmland assessment, tax abatement, or any charitable or statutory tax exemption; 5) name and address of the owner, if different from the address of the parcel; and 6) if residential, whether the owner is entitled to a deduction or exemption as a senior citizen, veteran, disabled veteran, or surviving spouse of a person in one of those categories." *Id.*

[47] *Id.*

[48] Higg-A-Rella, Inc. v. County of Essex, 628 A.2d 392, 394 (N.J. Super. Ct. Law Div. 1993).

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intended to do.[49] In reversing the trial court, however, the appellate court held that the legitimate commercial interest warranted access under the common law.[50]

The New Jersey Supreme Court, in affirming the reversal, agreed that the computer records were not available under the state Right-to-Know Law because county officials were not required to maintain the computerized records and because the definition of public records under the "narrowly drawn Right-to-Know Law still does not entitle citizens to obtain computer copies."[51] However, the court found that the company had a common law right of access because the common law made available any records created by public officials in the exercise of their duties. Under the common law, the court noted, the person requesting the records had to establish an interest in the subject matter and the right of access had to be balanced against the government's interest in preventing disclosure.[52]

In declaring that the company could copy the computer tapes, the N.J. Supreme Court said it was adapting the common law definition of public record "to the information age incrementally."[53] In previously declaring audiotapes to be public records under the common law but not the Right-Know-Law, the court had said the definition of a common-law record was not limited in scope just because it " 'was drawn from sources that spoke in terms of traces of ink on paper.' Likewise, we find that in view of rapidly advancing technological changes in storing information electronically, computer tapes also can be common-law public records." [54] However, even though the court had previously held that "the right to hand copy common-law public

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[49] *Id.* at 397 ("The computer tapes represent a tremendous amount of data entry at taxpayer expense. I see no reason why [county officials] should not decide whether they wish to sell it, and at what price.").

[50] Higg-A-Rella, Inc. v. County Of Essex, 647 A.2d 862, 866 (N.J. Super. Ct. App. Div. 1994).

[51] 660 A.2d at 1168.

[52] *Id.* at 1168-69.

[53] *Id.* at 1170.

[54] *Id.* at 1169. "The essence of the common-law is its adaptability to changing circumstances." (quoting Atlantic City Convention Ctr. Auth. v. South Jersey Publishing Co., 135 N.J. 53, 64 (1994)).

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documents translated directly into an equivalent right to photocopy them," it was not saying in *Higg-A-Rella* that the right to photocopy translated directly into an equivalent right to duplicate a computer file. "Although hand copies and photocopies are effectively similar, the same cannot be said of photocopies and computer copies," the court reasoned.[55]

In balancing the competing interests under the common law, the court concluded that the company's "legitimate for-profit enterprises" represented a legitimate private interest in the material[56] and that taxpayers had no expectation of privacy in the "very public" information.[57] However, the N.J. Supreme Court emphasized that computers could affect the right of access allowed under the common law, saying, "[T]he traditional rules and practices geared towards paper records might not be appropriate for computer records."[58] The court explained: "Those new considerations must be factored into the common-law balancing test between the State's interest in nondisclosure and the public's right to access."[59]

In the cases analyzed, only one other court – the Kansas Supreme Court – was called upon to interpret a common law right of access. In *State ex rel. Stephan v. Harder*,[60] the Kansas Medical Society in its amicus brief had contended that the state public records statute represented a codification of the public's common-law right to inspect government documents and, therefore, the state agency could require that the requester show proper "motives" and "reasons" for wanting to examine records and could close the records if disclosure was not in the public interest.[61] The Kansas Supreme Court disagreed, holding that "the common-law restrictions on public access to open records are inapplicable under the Kansas public records inspection act."[62]

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[55] *Id.* at 1170.

[56] *Id.* at 1169.

[57] *Id.* at 1170. "The lists contain simple, non-evaluative data that have historically been available to the public, and that do not give rise to expectations of privacy."

[58] *Id.* at 1171.

[59] *Id.*

[60] 641 P.2d 366, 8 Media L. Rep. (BNA) 1891 (Kan. 1982).

Compared to the number of claims of a statutory right of access, courts were called upon much less frequently to decide if a constitutional right of access to computerized government records existed. In the only case found to involve a claim under the federal Constitution, the court rejected a newspaper's argument that it had a First Amendment right of access to data from a statewide criminal justice information database. "It is well settled … that 'there is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. … The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act,'" Delaware Superior Court Judge Haile Alford said in 1999. "And, while release of the requested information may be good, desirable or expedient, that should not be confused with what is constitutionally commanded by the First Amendment."[63]

Requesters fared better when courts examined state constitutions for a right of access to computerized information. An Illinois appellate court in 1988 ordered the release of computerized information regarding state pension payments received by former members of the Illinois General Assembly, noting that the state constitution declared, "'[Reports] and records of the obligation, receipt and use of public funds of the State … are public records available for inspection by the public.'"[64] A Louisiana appellate court in 1979 granted a labor union access to a computer printout of the names and addresses of city employees, in part noting that the state constitution declared, "No person shall be denied the right to . . . examine public documents, except in cases established by law."[65] Fourteen years later, however, the Louisiana Court of Appeals said the same constitutional provision did not create a right of access to a "rap sheet" from the state's centralized, computer-based, criminal information system.[66] The court held that the "rap sheet" was not a public record under the constitution because of statutory exemptions and because of a substantial privacy interest.

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[61] *Id.* at 375.

[62] *Id.* ("The Kansas act places no burden on the public to show a need to inspect and requires no particular motives or reasons for inspection. It declares that all legally required records 'shall . . . be open for a personal inspection by any citizen . . . .' It gives the custodian no discretion and no choice; it imposes a duty upon the custodian, and subjects him or her to stringent penalties for noncompliance." (quoting KAN. STAT. ANN. § 45-201 *et. seq.* (1976))).

[63] Gannett Co. v. Delaware Criminal Justice Info. Sys., CA No. 98C-03-305, 1999 Del. Super. LEXIS 325, at *21-22 (Del. Super. Ct. 1999) (quoting Houchins v. KQED, Inc., 438 U.S. 1, 3 (1978)).

[64] Hamer v. Lentz, 525 N.E.2d 1045, 1048 (Ill. Ct. App. 1988) (quoting ILL. CONST. art. VII, § 1(c) (1970).

It seems then from the analysis of the cases that the strongest claim for a right of access to computerized government records comes from public records statutes. Similarly, courts relied most often upon statutory language to decide if a right of individual privacy existed in the computerized information being requested. The statutory language was usually from the exemptions to disclosure found in the access statute being applied by the court. [67]

In some cases, though, courts looked to specialized privacy statutes. For example, the Minnesota Supreme Court in 1978 noted that the state's Data Privacy Act was enacted "to control the state's collection, security, and dissemination of information in order 'to protect the privacy of individuals while meeting the legitimate needs of government and society for information.'"[68] The U.S. Supreme Court in 1989 similarly noted that the Privacy Act of 1974[69] "was passed

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[65] Webb v. City of Shreveport, 371 So. 2d 316, 5 Media L. Rep. (BNA) 1729 (La. Ct. App. 1979) (quoting LA. CONST., art. 12, § 3), *writ denied*, 374 So. 2d 657 (La. 1979).

[66] Ellerbe v. Andrews, 623 So. 2d 41, 43 (La. Ct. App. 1993).

[67] *See, e.g.*, Scottsdale Unified Sch. Dist. No. 48 of Maricopa County v. KPNX Broadcasting Co., 937 P.2d 689, 693 (Ariz. Ct. App. 1997) (a qualified right of disclosure under the state public records law as evidenced by the numerous statutory exemptions); Pantos v. San Francisco, 198 Cal. Rptr. 489, 492, 10 Media L. Rep. (BNA) 1279 (Cal. Ct. App. 1984) ("Where there is no contrary statute or public policy, the right to inspect public records must be freely allowed."); Maher v. Freedom of Info. Comm'n., 472 A.2d 321, 324-25 (Conn. 1984) (state agency bound to maintain its records available for public inspection unless the records fall within one of the statutory exemptions to disclosure); State ex rel. Stephan v. Harder, 641 P.2d 366, 368, 8 Media L. Rep. 1891 (Kan. 1982) (noting statutory exemptions for juvenile records, adoption records, records of the birth of illegitimate children, and any other records specifically closed by law or by directive authorized by law); Lexington-Fayette Urban County Gov't v. Lexington Herald-Leader Co., 941 S.W.2d 469, 470, 25 Media L. Rep. (BNA) 1759 (Ky. 1997) (noting an exemption in the state Open Records Act for "personal privacy"); and Industrial Found. of the South v. Texas Industrial Accident Bd., 540 S.W.2d 668 (Tex. 1976) (all persons are entitled to complete information regarding the affairs of government "unless otherwise expressly provided by law").

[68] Minnesota Medical Ass'n v. Minnesota Dep't of Pub. Welfare, 274 N.W.2d 84,87, 4 Media L. Rep. (BNA) 1872 (Minn. 1978) (quoting MINN. STAT. § 15.169, subd. 3(3) (1978)).

[69] 5 U. S. C. § 552a (1982 ed. and Supp. V).

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largely out of concern over 'the impact of computer data banks on individual privacy.'"[70] The Court said that although the Privacy Act contained an exemption for information required to be disclosed under the Freedom of Information Act, "Congress' basic policy concern regarding the implications of computerized data banks for personal privacy is certainly relevant in our consideration of the privacy interest affected by dissemination of rap sheets from the FBI computer."[71]

In several cases, courts did examine whether an individual right to informational privacy existed under federal or state constitutions,[72] but in only one case did a court consider whether such a privacy right was protected by the common law.[73] In none of these cases did the fact that the information was computerized influence the court's reasoning. In effect, the courts treated computerized data no differently than paper documents when determining if a constitutional or common law right of privacy blocked the disclosure of government records.

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[70] Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 766-67, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (quoting H. R. Rep. No. 93-1416, p. 7 (1974)).

[71] *Id.*

[72] Patterson v. State, 985 P.2d 1007, 1015 (Alaska App. 1999) (citing *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977)). "The Supreme Court also recognizes an individual's interest in non-disclosure of personal matters. This interest in non-disclosure is recognized in other cases and has been described as a right of confidentiality." *Id.* at 1017 (citing Alaska CONST. art. I, § 22); Westbrook v. County of Los Angeles, 32 Cal. Rptr. 2d 382, 387 (Cal. Ct. App. 1994), *review denied*, 1994 Cal. LEXIS 5772 (Cal. 1994). "The state constitutional right of privacy extends to protect defendants from unauthorized disclosure of criminal history records."; Webb v. City of Shreveport, 371 So. 2d 316, 317, 5 Media L. Rep. (BNA) 1729 (La. Ct. App. 1979), *writ denied*, 374 So. 2d 657 (La. 1979) (citing LA. CONST. art. 1, § 5). "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."; Tobin v Civil Service Comm, 331 N.W.2d 184, 191 (1982) (disclosure would not violate the employees' federal or state constitutional right to privacy); North Jersey Newspaper Co. v. Passaic County Bd. of Chosen Freeholders, 584 A.2d 275, 277-78 (N.J. Super. Ct. App. Div. 1990) (citing N.J. CONST. art. I, § 7); State *ex rel.* The Beacon Journal Publishing Co. v. Bodiker, 1999 Ohio App. LEXIS 3191 (1999); State *ex rel.* Beacon Journal Publishing Co. v. City of Akron, 640 N.E.2d 164, 23 Media L. Rep. (BNA) 1225 (Ohio 1994) (disclosure would violate the employees' federal constitutional right to privacy); and Industrial Found. of the South v. Texas Industrial Accident Bd., 540 S.W.2d 668, 679 (Tex. 1976) ("effective protection of the fundamental 'zones of privacy'" outlined by the Supreme Court by the mid-1970s implied "a concomitant right to prevent unlimited disclosure of information held by the government which, although collected pursuant to a valid governmental objective, pertains to activities and experiences within those zones of privacy").

[73] Tobin v Civil Service Comm, 331 N.W.2d 184, 190-91 (Mich. 1982) (release of magnetic tape including the names and home addresses of all classified civil service state employees to labor unions did not violate a common-law right of privacy).

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It seems clear, then, that battles over public access to computerized government data and individual privacy begin in the chambers of Capitol buildings nationwide because judicial weighing of these competing interests is dependent upon the statutory language used by Congress and state legislatures. This study now examines how courts ruling on access to computer records applied the six factors considered by courts deciding about ink-and-paper records.

Applying The Six Factors

As had their counterparts faced with requests for paper documents, courts faced with claims to computerized records recognized that individual privacy and public access were competing interests that had to be weighed against each other.[74] For example, the Kentucky Court of Appeals in 1994 relied upon a holding by its state supreme court two years earlier that determining whether public disclosure of paper documents would constitute a clearly unwarranted invasion of personal privacy entailed “‘a comparative weighing of antagonistic interests.’”[75] The Court of Appeals added, “As the [Kentucky] Supreme Court noted, the circumstances of a given case will affect the balance.”[76]

However, in 1989, the U.S. Supreme Court, in its only case involving a claim of individual privacy and public access to computerized government records, approved a categorical balancing under the Freedom of Information Act that would eliminate judicial subjectivity regarding certain categories of records. Writing for the Court in *Department of Justice v. Reporters Comm. for Freedom of the Press*, Justice Stevens noted that the lower court’s majority had "expressed concern about assigning federal judges the task of striking a proper case-by-case, or ad hoc, balance between individual privacy interests and the public interest in the disclosure of criminal-history information without providing those judges standards to assist in performing that task."[77] He concluded that "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction."[78]

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[74] See, e.g., Family Life League v. Department of Pub. Aid, 478 N.E.2d 432, 434 (Ill. App. Ct. 1985). "The decision in this case requires a delicate balance between two competing rights: (1) the statutory right of the people to full and complete disclosure regarding the affairs of their government and (2) the constitutionally protected right of individuals to privacy in regard to their personal affairs which is inherent in the Bill of Rights and which is expressly provided for in our Illinois Constitution. Plainly, neither right can be subjugated to the other right without doing violence to the precepts vital to a free society."

[75] Zink v. Commonwealth, 902 S.W.2d 825, 828 (Ky. Ct. App. 1994) (quoting Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co., Ky., 826 S.W.2d 324, 327 (1992)).

[76] *Id.* (quoting 826 S.W.2d at 328).

In the case before the Court, a CBS correspondent and the Reporters Committee for Freedom of the Press had sought the FBI computer "rap sheet" compiled for Charles Medico, whose family company had been identified by Pennsylvania authorities as "a legitimate business dominated by organized crime figures" and which allegedly had "obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman."[79] The rap sheets included "date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject"; the rap sheets were sometimes "incorrect or incomplete and sometimes contain information about other persons with similar names."[80]

Justice Stevens said the privacy interest in a rap sheet for a private citizen "will always be high."[81] The Court held "as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'"[82]

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[77] Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989).

[78] 489 U.S. at 776.

[79] *Id.* at 757.

[80] *Id.* at 751.

[81] *Id.* at 780. "When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir."

In a concurring opinion, however, Justice Blackmun, joined by Justice Brennan, disagreed with the Court's use of categorical balancing, calling it "not basically sound."[83] He urged the Court to "leave the door open for the disclosure of rap-sheet information in some circumstances."[84] For example, he said, what if the rap sheet would disclose "a congressional candidate's conviction of tax fraud five years before. Surely, the FBI's disclosure of that information could not 'reasonably be expected' to constitute an invasion of personal privacy, much less an unwarranted invasion, inasmuch as the candidate relinquished any interest in preventing the dissemination of this information when he chose to run for Congress."[85]

The Court's approval of categorical balancing has been followed not only by some lower federal courts[86] but also has been cited with approval by some state courts.[87] Even so, this research found that courts deciding on public access to computer copies of government records employed some or all of the six factors that had been applied in cases involving paper documents:

1) The nature and validity of the asserted privacy interest and the degree of the invasion of that interest;
2) The extent or value of the public's interest in disclosure;
3) The purpose or objective of the requester seeking disclosure;
4) The availability of the information from other sources;
5) Whether the government had promised confidentiality; and

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[82] *Id.*

[83] *Id.* (Blackmun, J., concurring).

[84] *Id.* at 781.

[85] *Id.* at 780.

[86] *See, e.g.*, Reed v. N.L.R.B., 927 F.2d 1249, 1252 (D.C. Cir. 1991). "[T]he balancing test we are instructed to administer contains no room for individualization or consideration of specific circumstances."

[87] *See, e.g.*, State *ex rel.* McCleary v. Roberts, 725 N.E.2d 1144, 1147 (Ohio 2000).

6) Whether it is possible to redact personal information so as to limit the breach of individual privacy.

This study will now address the factor for which computer technology made the most difference – the individual's privacy interest.

The privacy interest at stake

Just as when paper documents were at issue, courts considering access to computer records typically began their balancing by determining the privacy interest at stake. Most of them used a two-pronged approach in which they decided if disclosure would constitute an invasion of privacy and, if so, the degree or seriousness of that invasion. While only five of the courts attempted to define privacy, one of them was the U.S. Supreme Court in its *Reporters Committee* opinion. Writing for the Court, Justice Stevens rejected the argument that Medico's privacy interest approached "zero" because the information was available to the public elsewhere, calling that a "cramped notion of personal privacy."[88] To describe informational privacy, Justice Stevens relied upon a definition from Webster's Third New International Dictionary[89] and definitions provided by two privacy advocates – A. Breckenridge[90] and Arthur Westin.[91] All of these definitions articulated a right of the individual to control the flow of personal information.

In the same case, the lower court – the U.S. Court of Appeals for the District of Columbia – had used the same dictionary definition to come to a different conclusion about the privacy interest at stake in a criminal history compiled from public records, holding that the "ordinary

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[88] 489 U S. at 762-63.

[89] *Id.* at 763-64 ("According to Webster's initial definition, information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.'") (quoting Webster's Third New International Dictionary 1804 (1976)).

[90] *Id.* at 764 n.16 ("Privacy, in my view, is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others. . . . It is also the individual's right to control dissemination of information about himself.") (quoting A. Breckenridge, The Right to Privacy 1 (1970)).

[91] *Id.* ("Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others.") (quoting A. Westin, Privacy and Freedom 7 (1967)).

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meaning of privacy suggests that [FOIA] Exemption 7(c) does not exempt records consisting of information that is publicly available."[92]

It was the U.S. Supreme Court's description of privacy, however, that was relied upon by the Arizona Supreme Court in 1998.[93] In holding that broadcast journalists could not have access to a school district's computer records containing teachers' dates of birth, the court said, "Although we have never defined the meaning of privacy under the Public Records Law, the [U.S.] Supreme Court, interpreting the FOIA, has stated that information is 'private if it is intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.'"[94] The Arizona court added that the U.S. Supreme Court in *Reporters Committee* had "stated that the privacy interest encompasses 'the individual's control of information concerning his or her person.'"[95]

Similar definitions had been used by supreme court justices in California and Michigan prior to the *Reporters Committee* decision in 1989. In *Kestenbaum v. Michigan State University*, Michigan Chief Justice John W. Fitzgerald noted in 1982, "The concept of privacy is elusive. Social scientists and legal scholars alike have struggled for a definition expansive enough to include important concerns and yet narrow enough to be workable."[96] He concluded, however, that "[a]s society has expanded and distance contracted because of advances in communication and travel, the right to privacy for many has become the ability to choose with whom and under what circumstances they will communicate."[97]

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[92] Reporters Comm. for Freedom of the Press v. Department of Justice, 816 F.2d 730, 738 (D.C. Cir. 1987) (quoting Webster's Third New International Dictionary 1804 (1976)), *modified*, 831 1124 (D.C. Cir. 1987) (exemption 7 (c) provides protection for various law enforcement records).

[93] Scottsdale Unified Sch. Dist. No. 48 Of Maricopa County v. KPNX Broadcasting Co., 955 P.2d 534 (Ariz. 1998).

[94] *Id.* at 538 (quoting Reporters Comm., 489 U.S. at 763-64).

[95] *Id.* (quoting 489 U.S. at 763).

[96] 327 N.W.2d 783, 785 (Mich. 1982) (Fitzgerald, C.J., opinion for affirmance).

[97] *Id.* at 786.

In 1986, California Supreme Court Chief Justice Rose Elizabeth Bird noted that the 1972 privacy amendment to the state constitution "protects the right to informational privacy."[98] Quoting from an election brochure argument supporting the amendment, Justice Bird wrote: "Fundamental to our privacy is the ability to control circulation of personal information. ... This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives."[99]

Rather than defining the concept of privacy, most courts deciding on access to computer records tended to evaluate the privacy interest at stake based on the information's content and/or context. However, attitudes toward computers played a key role in some cases. Judges viewed the influence of computerized data on individual privacy very differently even when faced with the same facts.

For example, the Michigan Supreme Court, in 1982, split over whether the computer format for data affected the individual's reasonable expectation of privacy.[100] The case began when Lawrence Kestenbaum requested a copy of the magnetic computer tape that Michigan State University used to produce its student directory. Kestenbaum wanted to develop a list from which he could make mailings on behalf of political parties who would pay him for that service. Michigan State officials refused to provide the tape, offering instead a copy of the student directory when it was published or an immediate printout of the information on the magnetic tape.

The trial court ruled that MSU could delete all the information on the tape except the names and addresses of the students. The judge also ordered Kestenbaum to use the information only for political mailings and to return the duplicate tape after the election.[101] The court of appeals reversed, finding that Kestenbaum was not entitled to the computer tape because disclosure of the information would constitute an invasion of privacy.[102] That decision was affirmed by an equally-divided Michigan Supreme Court.

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[98] Perkey v. DMV, 721 P.2d 50, 58 (Calif. 1986).

[99] *Id.*

[100] Kestenbaum v. Michigan State Univ., 327 N.W.2d 783 (Mich. 1982).

[101] *Id.* at 784.

Chief Justice Fitzgerald, joined by two other justices, concluded that the release of names and addresses on a magnetic tape was a more serious invasion of privacy than disclosure of the information in a paper directory. He acknowledged that students could have opted out of being included in the student directory. He also acknowledged that students who did not opt out "should have known" that the information was available to the public and could be changed to a computer form by anyone in the public in order to compile mailing lists. "However, it does not follow that students should have known that an efficient and intrusive computer mailing system already was available to anyone for a nominal sum," he contended. "In deciding whether to appear in or opt out of the directory, students should not have been expected to consider the mechanics by which the university published the information."[103]

In contrast, Justice James Ryan, joined by two other justices, disagreed that students had any reasonable expectation that their information would only be released in printed form.[104] He contended that no reasonable expectation of privacy exists if the information sought is a computer copy of a public record also available in paper. In other words, if access to the paper record is not a violation of privacy, then access to a computer copy of the same record is not a violation. "We cannot accept the conclusion that the Legislature intended to allow a public body to exempt otherwise public records from disclosure by the simple expedient of converting the public record from one form to another," Justice Ryan reasoned. "Surely such a result would exalt form over substance. The plain language of the statute reveals a legislative intent to treat all government 'writings' in the same fashion regardless of form."[105]

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[102] Kestenbaum v. Michigan State Univ., 294 N.W.2d 228 (Mich. Ct. App. 1980).

[103] 327 N.W.2d at 789.

[104] *Id.* at 802 (Ryan, J., opinion for reversal).

[105] *Id.* (citing MICH. COMP. LAW § 15.232(e) (1982)).

Courts in New Mexico, New Jersey and New York have used the same reasoning as Justice Ryan. For example, the New Mexico Supreme Court in 1971 said, "We fail to understand how it can be said the inspection and copying of information contained on a printed and written affidavit of registration, which is a public record, is proper, but the inspection and copying of this identical information from the 'working master record' tape, which is also a public record, constitutes an invasion of the privacy of the individual named in and identified by this information."[106] The New Jersey Supreme Court similarly held that municipal tax assessment records also available in paper format did not create an expectation of privacy if copied on a computer tape.[107]

However, the New Jersey court emphasized that its decision could not be generalized to all cases in which computer copies of public records were sought. "Instances may indeed arise in which . . . release of computer tapes could trigger a high interest in confidentiality, even though the same information is readily available on paper," said the court.[108] It explained:

> Release of information on computer tape in many instances is far more revealing than release of hard copies, and offers the potential for far more intrusive inspections. Unlike paper records, computerized records can be rapidly retrieved, searched, and reassembled in novel and unique ways, not previously imagined. For example, doctors can search for medical-malpractice claims to avoid treating litigious patients; employers can search for workers'-compensation claims to avoid hiring those who have previously filed such claims; and credit companies can search for outstanding judgments and other financial data. Thus, the form in which information is disseminated can be a factor in the use of and access to records.[109]

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[106] Ortiz v. Jaramillo, 483 P.2d 500, 502 (N.M. 1971). *See also* Szikszay v. Buelow, 436 N.Y.S.2d 558, 563 (N.Y. Sup. Ct. 1981) (because the property assessment roll is open to public inspection in paper format, copying of computer tape including the same information is not an unwarranted invasion of privacy).

[107] Higg-A-Rella, Inc. V. County Of Essex, 660 A.2d 1163, 1170 (N.J. 1995). *See also* Higg-A-Rella, Inc. v. County Of Essex, 647 A.2d 862, 865 (N.J. Super. Ct. App. Div. 1994) ("no privacy interest exists because the exact records are freely available on paper instead of magnetic tape").

[108] 660 A.2d at 1170.

[109] *Id.* at 1171.

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Of all the opinions analyzed for this study, only Justice Ryan's opinion in *Kestenbaum* explicitly rejected the notion that computers automatically pose a greater threat to privacy. He contended:

> It is hard to take seriously the assertion that the advent of the modern computer era poses a significant threat to the secrecy of one's name and address. In the days of our forefathers, one's name and address were a matter of general public knowledge. An individual's home may still be a 'castle' into which 'not even the king may enter', but nothing prevents the king or anyone else from telling others whose castle it is, particularly when the castle-dweller himself has voluntarily released that information to the general public.[110]

He said the "supposed protection of students' privacy gained by denying" access to the computer tape was "both unfair and illusory." Justice Ryan explained:

> The denial is unfair because it penalizes only those groups or individuals unable to afford the cost of converting the printed information into magnetic tape form. This cost barrier is illusory in that any commercial organization anticipating a return from its solicitation in excess of the cost of creating the tape will have no deterrent whatsoever to putting the information in a computer-readable format. In fact, the actual number of unsolicited mailings to the student body might well increase, since the company has every incentive to recoup its initial investment by selling or renting the tape to as many groups or organizations as possible. The result would be that commercial solicitations of the student body would be feasible while political campaigns would be difficult, except perhaps for the particularly affluent.[111]

Other judges, however, expressed the belief that computerized information poses a greater threat to individual privacy than paper copies do. In *Kestenbaum*, for example, Chief Justice Fitzgerald said, "Form, not just content, affects the nature of information. Seemingly benign data in an intrusive form takes on quite different characteristics than if it were merely printed. The very existence of information in computer-ready format may serve to motivate an invasion of privacy."[112]

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[110] 327 N.W.2d at 796 n.18 (quoting Rowan v United States Post Office Dep't, 397 U.S. 728, 737, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970)).

[111] *Id.* at 801.

[112] 327 N.W.2d at 789 (relying upon Arthur Miller, *Computers, Data Banks and Individual Privacy: An Overview*, 4 COLUM. HUM. RTS. L. REV. 1, 10 (1972), in which Miller said, "Even if the cost of securing access to computerized information is higher than the cost of dredging out the information in a more traditional form of record,

Some courts were fearful of private databases of personal information compiled in part from public records. For example, the Massachusetts Court of Appeals in 1988 said privacy is threatened even when non-intimate details about large numbers of people are placed in computer databases.[113] "There is a negative public interest in placing the private affairs of so many individuals in computer banks available for public scrutiny," said the court.[114] It noted that a 1937 Massachusetts Supreme Court decision declaring motor vehicle records open "was written in an era prior to the advent of modern data processing technology which permits 'the aggregation of pieces of personal information into large central data banks.'"[115]

The possibility that data about children could be published worldwide on the Internet was a key consideration of the Ohio Supreme Court in 2000 when it denied public access to a computer database of government records.[116] A copy of the electronic database for the Columbus Recreation and Parks Department's photo identification program had been requested. The database included the names, home addresses, family information, emergency contact information, and medical history information of children who had received photographic identification cards to use city pools and recreation facilities. The trial court denied the request, holding that the database was not a public record as defined by state law. The court of appeals reversed the decision. The Ohio Supreme Court, though, held that the database was not a public record because it represented personal information collected by government that did not shed light on government activities. However, the court also held that even if the database were a

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the centralized quality and compactness of a computerized dossier creates an incentive to invade it because the payoff for doing so successfully is much larger.").

[113] Doe v. Registrar of Motor Vehicles, 528 N.E.2d 880 (Mass. App. Ct. 1988).

[114] *Id.* at 425.

[115] *Id.* at 421-22 (quoting Special Legislative Commission on Privacy, First Interim Report, 1975 House Doc. No. 5417, at 15, and at 10).

[116] State *ex rel.* McCleary v. Roberts, 725 N.E.2d 1144 (Ohio 2000).

public record, its disclosure would constitute an unwarranted invasion of privacy. The Ohio Supreme Court said:

> [A]ny perceived threat that would likely follow the release of such information, no matter how attenuated, cannot be discounted. We live in a time that has commonly been referred to as The Information Age. Technological advances have made many aspects our lives easier and more enjoyable but have also made it possible to generate and collect vast amounts of personal, identifying information through everyday transactions such as credit card purchases and cellular telephone use. The advent of the Internet and its proliferation of users has dramatically increased, almost beyond comprehension, our ability to collect, analyze, exchange, and transmit data, including personal information.
>
> In that regard, it is not beyond the realm of possibility that the information at issue herein might be posted on the Internet and transmitted to millions of people.[117]

Because of the inherent vulnerability of children, the court said it was "necessary to take precautions to prevent, or at least limit, any opportunities for victimization." Therefore, the court said, it could not "in good conscience" release the information.[118]

Other courts declared that computers pose a threat to privacy not just because they provide current information but also because they overcome practical obscurity by helping create life-long dossiers pieced together from data previously scattered among far-flung sources. The U.S. Supreme Court, for example, said in *Reporters Committee* that the privacy interest in a computerized criminal rap sheet compiled by the FBI was "affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80, when the FBI's rap sheets are discarded. … Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[119]

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[117] *Id.* at 1149.

[118] *Id.*

[119] Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989).

In contrast, the D.C. Circuit had rejected the argument that access to Medico's computerized rap sheet should be denied because computers made the records available too long. Wrote that court: "We see no principled basis by which a court can determine that a crime is so 'minor' that information regarding it, which a state considered significant enough to place on the public record, is in reality of little public interest. Nor can we say that an older public record has lost its public interest – old records may have historical importance."[120]

Some state courts have adopted the Supreme Court's reasoning. The Louisiana Court of Appeals in 1993, for example, relied upon the *Reporters Committee* opinion when it declared the state's centralized, computer-based criminal justice information system off limits to the public.[121] A year later, the California Court of Appeals likewise relied upon *Reporters Committee* when it denied access to computer tapes of a court system's compilation of criminal offense information.[122]

Robert Westbrook, who operated a business selling criminal background information to the public, sought monthly computer tapes of criminal offense information from the Municipal Courts of Los Angeles County. Specifically, he wanted the name, birth date and zip code of every person against whom criminal charges were pending in those courts, plus the case number, date of offense, charges filed, pending court dates, and disposition. Westbrook told the trial court that without the computer tapes, "he would have to travel to the 46 municipal court locations in the county to obtain the information. As a result, no one would be able to afford what he would have to charge them for the information."[123] The trial court declared as "nonsensical" the government's argument that Westbrook could have some information on computer tape and the other information only by traveling to each individual court to obtain it.[124] The appellate court, however, overturned the trial court decision granting Westbrook access to the information. The appellate court reasoned:

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[120] Reporters Comm. for Freedom of the Press v. Department of Justice, 816 F.2d 730, 741 (D.C. Cir. 1987).

[121] Ellerbe v. Andrews, 623 So. 2d 41 (La. Ct. App. 1993).

[122] Westbrook v. County of Los Angeles, 32 Cal. Rptr. 2d 382 (Cal. Ct. App. 1994), *review denied*, 1994 Cal. LEXIS 5772 (Cal. 1994).

[123] *Id.* at 383.

> There is a qualitative difference between obtaining information from a specific docket or on a specified individual, and obtaining docket information on every person against whom criminal charges are pending in the municipal court. If the information were not compiled in MCI, respondent would have no pecuniary motive (and presumably no interest) in obtaining it. It is the aggregate nature of the information which makes it valuable to respondent; it is that same quality which makes its dissemination constitutionally dangerous.[125]

The appellate court, fearing the power of computers to eliminate practical obscurity, said Westbrook had "in his possession information from which he can, over the years, compile his own private data base of criminal offender record information."[126] "[T]he potential for misuse of the information is obvious," the court said. "If, for example, the court ordered a record maintained by a criminal justice agency to be sealed or destroyed because a defendant had been found to be factually innocent of the charges, the information would still be available for sale by [Westbrook]. The only control on access to the information in [Westbrook's] possession would be the price he places on it."[127]

The Colorado Supreme Court relied upon the reasoning in *Reporters Committee* and *Westbrook* when it agreed in 1999 that computerized compilations of courts records should be treated differently from individual case files.[128] Requests for computer-generated bulk data containing court records should be decided on a case-by-case basis, the court said. "Whether bulk data should be released and to whom is a matter of important policy that necessarily involves the balancing of individual privacy concerns, public safety, and the public interest in fair and just operation of the court system."[129]

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[124] *Id.* at 384.

[125] *Id.* at 387.

[126] *Id.* at 384.

[127] *Id.* at 387.

[128] Office of the State Court Adm'r v. Background Info. Servs., 994 P.2d 420 (Colo. 1999).

The cases reviewed here indicate that at least some judges are more willing to accept – without citing any social scientific support or evidence beyond their own speculation – that computers and computerized information threaten individual privacy more than paper records do. The next question to explore is whether courts believe computers contribute to the public interest against which the privacy interest is balanced.

The public interests served by disclosure

Just as when paper documents were being requested, courts dealing with computer records weighed against the individual's privacy interest the good that disclosure would bring to the general public. In other words, the determination of whether an invasion of privacy is unwarranted typically depends upon the public interest at stake in the request. In *Reporters Committee*, however, the U.S. Supreme Court narrowed the public interest under the Freedom of Information Act to only disclosures of "[o]fficial information that sheds light on an agency's performance of its statutory duties."[130] Personal information in the hands of government that did not shed light on the conduct of government would not meet that public-interest standard. Writing for the Court, Justice Stevens said:

> That purpose … is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case -- and presumably in the typical case in which one private citizen is seeking information about another -- the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.[131]

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[129] *Id.* at 429-30.

[130] 489 U.S. at 772.

[131] *Id.*

Justice Stevens reasoned that disclosure of whether Medico had been arrested or convicted would "tell us nothing directly about the character of the Congressman's behavior. Nor would it tell us anything about the conduct of the Department of Defense (DOD) in awarding one or more contracts to the Medico Company."[132] While Medico's rap sheet conceivably could provide details for a news story, he said, "this is not the kind of public interest for which Congress enacted the FOIA." He explained:

> [A]lthough there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.[133]

In contrast, the U.S. Court of Appeals for the District of Columbia had concluded in the same case that courts should consider "the general disclosure policies of the statute."[134] The appellate court explained, "Since Congress gave us no standards against which to judge the public interest in disclosure, we do not believe Congress intended the federal judiciary – when applying only Exemptions 6 and 7(c) of the Act – to construct its own hierarchy of the public interest in disclosure of particular information."[135]

The U.S. Supreme Court's reasoning, however, has been adopted by some state courts determining the public interest under their respective public records statutes. In 1993, for example, the Louisiana Court of Appeals, noting that its statute was similar to the federal FOIA, held that the policy behind its statute was "the public's right to be informed of what our government is up to."[136] The court denied a request for an individual's file in the state's centralized, computer-based criminal justice information system.

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[132] *Id.* at 774.

[133] *Id.*

[134] 831 F.2d at 1126.

[135] *Id.*

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In only three of the cases analyzed for this study did judges note that computers can aid in the public's inspection of government records and, therefore, in the disclosure what government is doing. In 1973, for example, the New Hampshire Supreme Court reasoned that releasing computer copies of real estate tax assessment records made more sense than restricting disclosure to paper copies.[137] A Dartmouth College economics professor conducting a tax study had sought computer copies of Manchester's real estate tax assessment records, which included "ownership of the land, whether it is rental property, property factors (topography, improvements, trend of the district), type of occupancy, construction, computations as to how the value was arrived at, and a sketch of the property."[138] The court noted that examining the 35,000 field cards would take 200 man-days at a cost of about $10,000[139] and then said, "The ease and minimal cost of the tape reproduction as compared to the expense and labor involved in abstracting the information from the field cards are a common sense argument in favor of the former."[140]

In 1971, the New Mexico Supreme Court similarly held that the right to inspect public records should "carry with it the benefits arising from improved methods and techniques of recording and utilizing the information … so long as proper safeguards are exercised as to their use, inspection, and safety."[141] And in *Kestenbaum*, Justice Ryan of the Michigan Supreme Court argued that public access to electronic records should not be denied just because computer copies make the information more usable.[142] He explained:

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[136] Ellerbe v. Andrews, 623 So. 2d 41, 44-45 (La. Ct. App. 1993) (relying upon Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 744 (1989)).

[137] Menge v. City of Manchester, 311 A.2d 116 (N.H. 1973).

[138] *Id.*

[139] *Id.* at 118.

[140] *Id.* at 119.

[141] Ortiz v. Jaramillo, 483 P.2d 500, 501 (N.M. 1971).

> [T]o equate usefulness with intrusiveness is to turn the FOIA on its head. A public body should not be allowed to thwart legitimate uses of public information by releasing the information in a format difficult or expensive to use. Releasing the requested names and addresses in handwritten form would make it even more difficult to read and use the information; surely that does not mean that a person requesting a printed copy can be given a handwritten copy because the latter is less usable and therefore less 'intrusive'? Following that rationale would encourage a public body to meet its FOIA requests with the response that the actual public document or 'writing' cannot be copied, but the agency will gladly produce the same 'information' in a 'less intrusive' form such as a foreign language, Morse Code, or hieroglyphics.[143]

These judges were clearly in the minority, however, when they recognized that computerized information can help the public learn about the actions of government. Most of the courts seemed to place little value on the use of computers to facilitate access to public records and, therefore, to support a public interest in disclosure.

However, the computer format of the public records was very much on the minds of at least some judges as they considered the private interests actually – or potentially – served by the release of the documents.

The private interests served by disclosure

A number of federal and state courts considering claims to government computer files reaffirmed the principle that any person is eligible to request public records. In *Reporters Committee*, the U.S. Supreme Court held that determining whether an invasion of privacy is warranted "cannot turn on the purposes for which the request for information is made" and that "the identity of the requesting party has no bearing on the merits of his or her FOIA request. . . . As we have repeatedly stated, Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'"[144] The U.S. Court of Appeals for the District of Columbia likewise had held the news media's interest in investigating a corrupt congressman could not be considered because the statute made information equally available to anyone.[145] "If a record must be released under FOIA when requested by a news reporter for the purpose of publication, it must be released upon request of an ordinary citizen," the court said.[146]

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[142] 327 N.W.2d 783, 802 (Mich. 1982) (Ryan, J., opinion for reversal).

[143] *Id.*

State courts in California,[147] Illinois,[148] Kansas,[149] Kentucky,[150] Louisiana[151] and Massachusetts[152] used the same reasoning when ruling on access to computer copies of public records. An Illinois court, for example, noted that its state public records statute did "not require that the persons requesting the information explain their need for that information or their planned use of the information. The Act seeks to achieve a highly desirable goal; namely, that the public knows how its tax dollars are being spent."[153] A California court reasoned that the requester's purpose could not be considered because "once a public record is disclosed to the requesting party, it must be made available for inspection by the public in general."[154]

However, a number of courts considered the private interest served by disclosure, and five of them – including two in California – were hostile to the commercial motivations of requesters.[155] In many of these cases, the records probably would not have been requested had they been paper files.[156] For example, the California Court of Appeals noted that the entrepreneurial reason for seeking the records would not have existed had the information not been in computer files.[157] In *Westbrook v. County of Los Angeles*, the California Court of Appeals said that if the court records were not kept in a computer system, the plaintiff would have had no monetary motive for seeking them.[158] "It is the aggregate nature of the information which makes it valuable to respondent; it is that same quality which makes its dissemination constitutionally dangerous," the court said.[159] Under the penal code, the court said, a business selling criminal background information to the public was only entitled to criminal offense information compiled by a court if the company could show a "compelling need."[160] The court found the information sought by Westbrook to be part of the master record of "criminal offender record information," the dissemination of which was limited by the state penal code to public officials and agencies entitled to receive it as part of their duties and to others only "upon a showing of a compelling need."[161] In denying access to the computerized court records, the court said Westbrook was not authorized to receive the information and his desire to sell the information did not qualify as a legally acceptable need to know the information.[162]

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[144] 489 U.S. at 771 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975)).

[145] 816 F.2d at 741.

[146] *Id.* at 742.

[147] *See* City of San Jose v. Superior Court Of Santa Clara County, 74 Cal. App. 4th 1008 (Cal. Ct. App. 1999).

[148] *See* Family Life League v. Department of Pub. Aid, 493 N.E.2d 1054 (Ill. 1986).

[149] *See* State ex rel. Stephan v. Harder, 641 P.2d 366, 8 Media L. Rep. (BNA) 1891 (Kan. 1982).

[150] *See* Zink v. Commonwealth, 902 S.W.2d 825 (Ky. Ct. App. 1994).

[151] *See* Webb v. City of Shreveport, 371 So. 2d 316, 5 Media L. Rep. (BNA) 1729 (La. Ct. App. 1979), *writ denied*, 374 So. 2d 657 (La. 1979).

[152] *See* Doe v. Registrar of Motor Vehicles, 528 N.E.2d 880 (Mass. App. Ct. 1988).

[153] Family Life League v. Department of Pub. Aid, 493 N.E.2d 1054, 1057-58 (Ill. 1986).

[154] City of San Jose v. Superior Court Of Santa Clara County, 74 Cal. App. 4th 1008, 1018 (Cal. Ct. App. 1999).

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[155] *See* Westbrook v. County of Los Angeles, 32 Cal. Rptr. 2d 382 (Cal. Ct. App. 1994), *review denied*, 1994 Cal. LEXIS 5772 (Cal. 1994); Pantos v. San Francisco, 198 Cal. Rptr. 489, 10 Media L. Rep. (BNA) 1279 (Cal. Ct. App. 1984); Zink v. Commonwealth, 902 S.W.2d 825 (Ky. Ct. App. 1994); Kestenbaum v. Michigan State University, 294 N.W.2d 228 (Mich. Ct. App. 1980); and Doe v. Registrar of Motor Vehicles, 528 N.E.2d 880 (Mass. App. Ct. 1988).

[156] *See, e.g.*, Kestenbaum v. Michigan State Univ., 327 N.W.2d 783 (Mich. 1982), in which an entrepreneur requested a computer copy of the student directory in order to make mailings on behalf of political parties; Higg-A-Rella, Inc. v. County of Essex, 660 A.2d 1163 (N.J. 1995), in which a company selling municipal tax-assessment data to real-estate brokers sought a computer tape containing the tax-assessment records of every municipality in the county; and State *ex rel.* McCleary v. Roberts, 725 N.E.2d 1144 (Ohio 2000), in which the plaintiff sought a copy of the computer database of children who used city pools and recreation facilities.

[157] Westbrook v. County of Los Angeles, 32 Cal. Rptr. 2d 382 (Cal. Ct. App. 1994), *review denied*, 1994 Cal. LEXIS 5772 (Cal. 1994).

[158] *Id.* at 387.

[159] *Id.*

[160] *Id.* at 384-85 (citing Penal Code §13300, subd. (c)).

[161] *Id.*

Other courts discussed hypothetical private interests that could be better served by computer records. In *Higg-A-Rella, Inc. v. County of Essex*, for example, the New Jersey Supreme Court explained that computer records made it easier for doctors to search medical-malpractice claims for patients more likely to sue and for employers to identify job applicants who had filed workers'-compensation claims.[163] The Ohio Supreme Court, in 2000, worried that a government computer file of personal data about children could be placed on the Internet and be used for criminal purposes.

While the computer format of records was not the explicit reason courts devalued the private interests of some requesters, it certainly was a consideration by those courts. The computer format was a key consideration in courts' analysis of only one other of the six factors often utilized in balancing access and privacy claims. The next section of this study examines the role that computerized information played when some courts considered whether to redact exempt information and allow disclosure of non-exempt data.

The possibility of redacting personal information

This study found some courts supportive of redaction of personal information when computer records were at issue.[164] For example, a Connecticut trial court said the redaction of exempted names and addresses from computerized Department of Motor Vehicle records would protect the privacy of individual motorists and still allow the disclosure of important information.[165] "Indeed," the judge said, "such sanitized information could be the source of important statistics, useful for a variety of legitimate purposes, without harming any of the interests protected by the statute."[166] Courts in some states found that redaction was required by statute.[167] For example, Illinois courts noted their state public records statute requires any agency maintaining a record with exempt and nonexempt data to separate the exempt material and disclose the rest of the document.[168] Therefore, the Illinois Supreme Court said, "The mere presence or commingling of exempt material does not prevent the district from releasing the nonexempt portion of the record."[169]

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[162] *Id.* at 386.

[163] 660 A.2d 1163, 1171 (N.J. 1995).

[164] *See* City of San Jose v. Superior Court Of Santa Clara County, 74 Cal. App. 4th 1008 (Cal. Ct. App. 1999); Kozlowski v. Freedom of Info. Comm'n, 1997 Conn. Super. LEXIS 2000 (Conn. Super. Ct. 1997); and Minnesota Medical Ass'n v. Minnesota Dep't of Pub. Welfare, 274 N.W.2d 84, 4 Media L. Rep. 1872 (Minn. 1978).

Several courts recognized that compared to other record formats, computerized data provide more protection for confidential information. For example, the Minnesota Supreme Court in 1978 said, "Retrieving the data from the computer rather than allowing access to the microfilm copies protects the confidentiality of the patients since only the specific information sought need be disclosed."[170] Illinois[171] and Kansas[172] courts were willing to require governmental entities to create new computer software if necessary to delete confidential information. The courts required the requesters to pay for the special programs.

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[165] Kozlowski v. Freedom of Info. Comm'n, 1997 Conn. Super. LEXIS 2000 (Conn. Super. Ct. 1997).

[166] *Id.*

[167] *See, e.g.*, State *ex rel.* Stephan v. Harder, 641 P.2d 366, 8 Media L. Rep. 1891 (Kan. 1982).

[168] *See* Bowie v. Evanston Community Consol. Sch. Dist. No. 65, 538 N.E.2d 557 (Ill. 1989) (citing ILL. REV. STAT. ch. 116, par. 208 (1985)); Hamer v. Lentz, 547 N.E.2d 191, 17 Media L. Rep. (BNA) 1268 (Ill. 1989); and Hamer v. Lentz, 525 N.E.2d 1045 (Ill. Ct. App. 1988).

[169] Bowie v. Evanston Community Consol. Sch. Dist. No. 65, 538 N.E.2d 557, 560 (Ill. 1989).

[170] Minnesota Medical Ass'n v. Minnesota Dep't of Pub. Welfare, 274 N.W.2d 84, 86 n.1, 4 Media L. Rep. (BNA) 1872 (Minn. 1978).

[171] *See* Hamer v. Lentz, 547 N.E.2d 191, 195, 17 Media L. Rep. (BNA) 1268 (Ill. 1989); and Family Life League v. Department of Pub. Aid, 493 N.E.2d 1054, 1058 (Ill. 1986).

[172] State *ex rel.* Stephan v. Harder, 641 P.2d 366, 378-79, 8 Media L. Rep. (BNA) 1891 (Kan. 1982).

Illinois courts even ordered a school district to "scramble" computerized data to further cloak identifying information.[173] Parents had sought standardized California Achievement Test scores for students from certain years, grades and schools within the school district; they did not ask for the names or genders of the students.[174] The trial court had dismissed the lawsuit, reasoning that disclosure would violate the students' privacy and that a district status report supplied "sufficient information" to satisfy the request.[175] The Illinois Court of Appeals and Illinois Supreme Court ordered the school district to release the information after first deleting the students' names and genders and then scrambling the scores alphabetically.[176]

Illinois Supreme Court Justice Benjamin Miller disagreed with this approach, however, saying he saw nothing in the public records statute "which indicates that the legislature intended to impose a duty on public bodies to use their computer capabilities to provide information in a form that would make the material nonexempt. The act simply does not differentiate between records stored in computers and those maintained manually."[177]

Justice Miller also said he was not "convinced that such a distinction would be advisable" because it would create a two-tier system for disclosure that encouraged government agencies to keep documents in a paper format with fewer disclosure requirements. He explained:

> The recognition of a greater duty to modify exempt information that is stored in computers than that which is stored manually would essentially mean that public records maintained by computers would be subject to broader disclosure requirements than manually kept records. Thus a distinction between computer and manually maintained records may create an incentive in public bodies to

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[173] Bowie v. Evanston Community Consol. Sch. Dist. No. 65, 538 N.E.2d 557, 561 (Ill. 1989) ("[W]here, as here, individual identifying information can be redacted and the record scrambled, preventing a clearly unwarranted invasion of personal privacy, the record must be disclosed."); and Bowie v. Evanston Community Consol. Sch. Dist. 65, 522 N.E.2d 669, 673 (Ill. Ct. App. 1988).

[174] 538 N.E.2d at 558.

[175] *Id.* at 559.

[176] Bowie V. Evanston Community Consol. Sch. Dist. 65, 522 N.E.2d 669, 673 (Ill. Ct. App. 1988). (Deletion of students' names and sexes and the scrambling of the alphabetical order of their scores would make their identification virtually impossible, notwithstanding the disclosure of their race.")

[177] 538 N.E.2d 557, 563 (Ill. 1989) (Miller, J., dissenting).

> record certain types of information in computer form and other types in manual form depending on how desirable its disclosure to the public may be perceived. I do not believe that such incentives are in the public interest.[178]

Even so, courts seem more likely to accept redaction as a way to protect confidential information while disclosing non-exempt data. Computers were likely to be viewed as a useful tool in achieving that goal. In essence, a computerized format for government records makes it easier for courts to withhold private information while disclosing the remaining public data.

The remaining factors

For the remaining two factors that courts considered, it did not matter to courts that computer copies of records had been requested. Courts weighed these factors in the same ways that courts do when the records are made of paper. For example, three courts considered whether alternate means of obtaining the information reduced the need for the requested records to be disclosed.[179] In each case, that factor was considered without any discussion of computer copies versus hard copies of the information. The key was simply whether the information itself was available elsewhere. For example, the California Court of Appeals in 1999 decided that *Mercury News* reporters seeking the identities of people who had complained to the city about municipal airport noise had "alternative means of contacting and interviewing the complainants other than by intruding on their privacy through forced disclosure of their identities from government records."[180] Reporters could canvass neighborhoods near the airport and could contact complainants who had made their identities public by appearing at city council meetings, joining an anti-airport noise group, or by disclosing their names on the group's World Wide Web site the court said.[181]

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[178] *Id.* at 563-64.

[179] Scottsdale Unified Sch. Dist. No. 48 Of Maricopa County v. KPNX Broadcasting Co., 955 P.2d 534, 540 (Ariz. 1998); City of San Jose v. Superior Court of Santa Clara County, 74 Cal. App. 4th 1008, 1025 (Cal. Ct. App. 1999); and Kestenbaum v. Michigan State University, 294 N.W.2d 228, 235 (Mich. Ct. App. 1980).

[180] City of San Jose v. Superior Court of Santa Clara County, 74 Cal. App. 4th 1008, 1025 (Cal. Ct. App. 1999).

Computers also were a non-issue in the consideration of whether an agency's promise of confidentiality overrode a statutory duty to disclose public records. The Arizona Court of Appeals in 1997 said a school district's promise of confidentiality to teachers could not preclude the release from computer databases of the names and birth dates for some 30,000 teachers.[182] "[I]f the promise of confidentiality were to end our inquiry, we would be allowing a school district official to eliminate the public's right under Arizona's Public Records Law," said the court. "We cannot allow a school district to exempt public records from disclosure simply by promising confidentiality."[183]

Summary, Conclusions and Recommendations

In 1965, the U.S. Senate Judiciary Committee recommended – in a report accompanying what would eventually become the Freedom of Information Act – a statute reflecting "a general philosophy of full agency disclosure."[184] However, the committee noted that when a "broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files."[185] The committee elaborated:

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated.

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[181] *Id.*

[182] Scottsdale Unified Sch. Dist. No. 48 of Maricopa County v. KPNX Broadcasting Co., 937 P.2d 689, 691-92 (Ariz. Ct. App. 1997).

[183] *Id.*

[184] S. Rep. No. 813, 89th Cong., 1st Sess., at 3 (1965).

[185] *Id.*

> Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.[186]

The U.S. Supreme Court has quoted this passage on at least two occasions.[187] It could hardly be argued, however, that in the last thirty-eight years the Supreme Court, lower courts or even Congress has provided a workable formula encompassing, balancing and protecting both the public's access to government records and the individual's private information contained in those documents. Instead, the legal landscape on this issue has come to resemble more the one Justice Burger warned of in 1978: Hundreds of judges deciding ad hoc what is private and what is public "according to their own ideas of what seems 'desirable' or 'expedient.'"[188] The subjectivity of the judicial decision-making has intensified with the introduction of computers. In *Kestenbaum v. Michigan State University*, for example, judges on the same court could agree that government information should be publicly available in paper format; yet based on no more than a difference in attitudes toward computers, they formed opposite conclusions about the availability of electronic copies of the same information.[189]

The purpose of this research was to determine how federal and state courts balance public access against personal privacy when government-held information is sought in a computer format. In other words, how do trial judges and appellate courts decide which of these competing interests is paramount in such situations? And to what degree do judicial attitudes toward computers affect this balancing? In the end, alternatives to the current balancing approach are recommended to better protect truly private information while ensuring public access to more government-held computer records.

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[186] *Id.*

[187] Department of Air Force v. Rose, 425 U.S. 352, 372-73 n.9 (1976); and EPA v. Mink, 410 U.S. 73, 80 (1973).

[188] Houchins v. KQED, 438 U.S. 1, 14 (1978). "There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would ... be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems 'desirable' or 'expedient.'"

[189] 327 N.W.2d 783 (Mich. 1982).

To find its answers, this study began with an examination of the legal bases for the rights being balanced by courts. It found that a request for any type of government record typically relies upon a public records act, making these statutes the basis for the vast majority of public records lawsuits. In some cases, statutes such as the federal Privacy Act of 1974 provide the basis for a privacy claim intended to block disclosure. The result is that courts typically rely upon statutes to determine the interests in public access and informational privacy that are at stake and how to balance them. To decide, therefore, if each right exists and which should be paramount, courts are relying most frequently upon statutory language, regardless of whether computer copies of government records have been requested. This means judges are often interpreting the nuances of statutory text, an endeavor that can be hindered by a muddy legislative history. Under these circumstances, judges are left to create their own mechanisms for balancing these competing interests.

This research next examined the cases for the six factors previously identified as being used by courts to balance privacy and public access to ink-and-paper documents. It found that courts applied no new factors when weighing the competing claims of privacy and public access to computer records. In most of the computer-related cases studied, the computer format of the government records received only a brief mention by the courts. When computers were of importance to the judiciary, however, their presence was more likely to tip the scales in favor of individual privacy and against public access. Judges were more likely to treat computers as a threat to privacy, not as a tool for the public to make use of records created and maintained by its own government.

Only one judge explicitly rejected the assumption that computers automatically pose a greater danger to privacy. Other judges simply believed that computer files threaten individual privacy more than paper records do. Simply put, they seem to fear the technology. In their view, even benign data can become intrusive when placed in a computer because such a format makes the information more usable by third parties. Computers make it easier and cheaper to collect, store, manipulate and retrieve large amounts of information. This leads to private databases of personal information compiled from public records. Such databases pose a threat to privacy by providing access to current information and by creating life-long dossiers pieced from data previously scattered among far-flung sources.

However, their fears and assumptions were turned into law without the support of stronger evidence beyond the judges' own speculation, such as a statistical analysis regarding the actual possibility of privacy-invading actions by those who might obtain the information. Without a statutory definition of informational privacy and a firmer set of guidelines to follow, these judges are relying upon a "I-know-it-when-I-fear-it" approach to determining the privacy interest at stake when computerized records are involved.

For the purposes of evaluating potential privacy violations, courts have taken seriously the computer's capability to accumulate, store, manage and distribute great amounts of data. Yet few judges noted that those same capabilities could help the public inspect government records and, therefore, ultimately understand what the government is up to. Only three times did judges see computers as a tool to help the public find out what government is doing, which courts have generally considered to be the most important public interest to be weighed against individual privacy. Courts seem to be ignoring valuable traits of the computer that support this public interest in disclosure.

At the same time, however, courts do not seem uninformed about what computers can do. Judges are willing to use the computer to redact personal information from government data and allow a limited disclosure. State courts in Illinois and Kansas even required government bodies to create – at the requester's expense – new computer software if necessary to delete exempted data. Illinois courts even ordered government to "scramble" alphabetized computer data to further disguise identifying information.

This study found that courts often ignored the fact that the requested public records were in a computer-ready format. For the most part, judges treated computer copies of government documents no differently than they did paper copies. They applied the same factors in the same ways. However, when computers were explicitly considered as part of the formula, the balancing of these factors was clearly weighted in favor of privacy. Based on their own reactions to the technology, some judges seemed more likely to consider computers as a threat to privacy rather than a tool to help the public learn about the actions of government. At best, the computer was treated as a device for removing information from the public's grasp because it made the redaction of data easier to accomplish.

For privacy advocates, these findings mean they are more likely to find an ally on the bench when the battle over privacy and public access enters the courtroom. For reporters and others in the public seeking access to government records, these findings mean their battles should be waged in Congress and state legislatures, where they can argue for statutes articulating the same treatment for computer records as for paper ones.

Granted, relying upon legislative bodies is not a perfect solution. Telling frightened constituents that their privacy will be safeguarded is a safer route to re-election than explaining to voters the social value of releasing their personal information on a computer disk to the media, telemarketers and others that society holds in generally low regard. However, the legislative arena allows a fuller hearing on the interests at stake than does the presentation of narrowly tailored information to courts.

As the cases studied here have illustrated, judges often make ad-hoc decisions based on the specific facts before them and their own speculation or assumptions about computer technology, without considering the broader implications of their rulings on the overall balance of individual privacy and public access. This is not surprising given the nature of judicial decision-making and the imperative that courts decide only concrete cases and controversies. But decisions made and principles asserted on the basis of the narrow facts of a specific case often are used in other cases, eventually leading to the development of a broad rule. That broad rule, however, may be the result of narrow and incomplete fact-finding and unsupported assumptions.

Legislative bodies, however, with their greater fact-finding powers and ability to address more than specific "cases and controversies," are in a much better position to handle the tough questions of defining terms, both conceptually and empirically. The legislative fact-finding process by its nature invites the participation of a wide spectrum of interests, not just those involved in a particular case or controversy (and those willing and able to file *amicus* briefs). This means, though, that journalists and other advocates of open government must play an active role by explaining to legislators the importance of public access to computerized government records.

Through this legislative process, lawmakers should discard the definition of informational privacy created by privacy advocates and adopted by some courts. Their conceptualization should recognize that privacy is not an absolute right of individual control and that not all personal information is necessarily private. However, legislators should also establish clearly defined categories of records and information, *e.g.*, medical files and Social Security numbers, considered confidential even in the hands of government. This statutory language should be unambiguous, avoiding such phrases as "similar files" or "unwarranted invasions of privacy."

Lawmakers should also explicitly recognize that the public interest served by the disclosure of computerized records is more than educating the public about government activities or exposing governmental wrongdoing. Gleaning personal information about someone from government databases can serve more than just "idle curiosity." Such information can help people make more informed choices in a number of life-affecting decisions, such as selecting a doctor, a child-care provider, a business partner or even a potential spouse. Serving these individual interests provides a public good.

Legislative bodies should also reaffirm that "any person" does indeed mean that anyone is entitled to obtain computerized government documents. The purpose of the request, including for commercial gain, should not be an obstacle. Criminal conduct facilitated by information from government data should be punished accordingly, but access to those computer files should not be cut off because someone might use the data for illegal purposes.

Statutory language should also clearly recognize access rights to computerized records. In other words, statutes should specifically declare that the format of the record has no affect on public access rights and that requesters have the right to ask for the record in the format they choose.

Of course, no piece of legislation can anticipate all the factual scenarios that will arise, and no matter how specific, detailed and concrete legislators try to make a statute, courts still will have to interpret and apply it. However, as judges interpret and apply these statutes, they should stop speculating about privacy violations that might occur, recognize that computers not only can be used to invade privacy but also to significantly enhance the free flow of needed information to the public, and disregard the computer format of government records.

If accepted by legislators and courts, these recommendations would help courts be more consistent, predictable and balanced in weighing the individual's privacy against the public's access to the government's computer records.

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